

AN
E S S A Y
ON THE LEARNING OF
CONTINGENT REMAINDERS
AND
EXECUTORY DEVISES.

E S S A Y

ON THE LAWS OF

CONTINGENT REMEDIES

EXECUTORY DEVICES

BY CHARLES K. HARRIS

ATTORNEY AT LAW OF NEW YORK

Author of

AGRICULTURAL CHARTS OF LANDS AND FORESTS

Some years ago, of the same author, published

THE FOURTH EDITION

Revised, Corrected, and greatly enlarged

DUBLIN

PRINTED BY H. WATTS, NO. 1, CECILY STREET, LONDON
and J. RICE, NO. 1, COLLEGE STREET, DUBLIN

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AND
EXECUTORY DEVISES.

By CHARLES FEARNE, Esq.
BARRISTER AT LAW OF THE INNER TEMPLE.
AUTHOR OF THE
LEGIGRAPHICAL CHART OF LANDED PROPERTY.

Scire autem proprie est, rem ratione et per causam cognoscere.

THE FOURTH EDITION,
Revised, Corrected, and greatly Enlarged by the Author.

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PRINTED BY H. WATTS, No. 3, CHRIST CHURCH-LANE,
AND J. RICE, No. 5, COLLEGE-GREEN.
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T O

JAMES BOOTH

O F

LINCOLN

SIR

YOUR great Eminence in that
branch of the profession, which the
subject of the following letter par-
ticularly concerns, necessarily makes
the sanction of your name a consider-
able object of the author's ambition.
At the same time that the familiarity
he experiences in the person of your
intimate, good opinion and friendship
forbids him to abstain from a formal
apology for the freedom to which that
ambition has impelled him in this
Address, which he hopes you
will

T O
JAMES BOOTH,

O F

LINCOLN'S-INN, Esq.

S I R,

YOUR great Eminence in that branch of the profession, which the subject of the following sheets particularly concerns, necessarily makes the sanction of your name a considerable object of the author's ambition. At the same time that the Partiality he experiences in the Honour of your intimacy, good opinion and friendship, forbids him to descend into a formal apology, for the freedom to which that ambition has impelled him, in this ADDRESS; which he hopes, Sir, you will

will accept, as a public testimony of his unfeigned respect for your great professional character and abilities, and of his wishes to acknowledge the particular obligations he is under, to your good opinion and friendship. Such an indulgence, Sir, he begs leave to assure you, will be no unimportant addition to the favours already felt by, Sir,

Your most respectful,

most obliged,

and obedient servant,

CHARLES FEARNE.

TO THE

R E A D E R.

OF all the intricate learning in which the *English* laws of property are involved, there is scarcely any more abstruse, or yet more necessary to be attended to by the *Profession*, than the doctrine of *contingent estates*. This, it is presumed, the experience of every gentleman, conversant in that branch of the profession which is the immediate province of the *conveyancer*, can sufficiently testify. And yet, amongst all the many treatises that have been hitherto published upon several detached heads of our laws, not one has attempted this subject. This must appear extraordinary, when it is considered, that all which is afforded us upon the matter in our abridgments and books of reports, is either very desultory and of confined scope, or else thrown together,

gether, without reference to principles, or the least attention to method, system or connection.

A field so open, and yet apparently so rich, seemed to promise much to a little industry. Taken with the appearance of the thing, the author of the ensuing essay turned the matter in his mind, till he really flattered himself there might be a sort of merit, in disposing the result of his researches upon the subject, into one connected view; this he accordingly attempted in the first edition of the following essay. However, the nature of the subject itself concurred with the obscurity of his own name, in making it prudent for him not to carry the experiment beyond the bounds of a few pages; in which he endeavoured to touch the outlines, at least, of what then appeared to him most material in the doctrine of *contingent remainders* and *executory devises*; and even to reach some points not to be found in any preceding treatise or system of our laws. The success which attended an attempt labouring under the insuperable disadvantages of limits so contracted, encouraged

raged him to venture upon a more expanded view of the subject, in a second edition. The reception which that edition met with, was such, that it is now about a twelvemonth since the author found himself again called upon to revise the book for the press.

The approbation attending what he had already done, might perhaps have excused him in resting there; especially as the avocation of his professional practice, rendered it highly inconvenient for him to appropriate any further time to emendations. But to rest where there is any call and ground to move, was never a part of his disposition; he saw that his endeavours still admitted of correction and improvement; he felt the encouragement they had met with operate as a demand upon his further industry, in the path he had broken; and therefore he resolved not to let the book pass through his hands again, without such corrections and additional matters, as he had reason to see, would render it more accurate and useful. And though his attention to the necessary engagements of his profession, has unavoidably delayed

b

the

the completion of his plan so much longer than he wished; yet, he flatters himself the additions which have occasioned that delay, will sufficiently warrant it.

PERICULOSUM *existimo quod doctorem virorum non comprobatur exemplo*, is a maxim of Lord Coke.—Now upon this principle, it remains for the author of these sheets to exculpate himself, for differing diametrically in opinion from the learned Reporter of some late cases in the court of King's Bench; who it seems, has declined entering into the arguments or opinions of that court, in the late case of *Perrin v. Blake*; BECAUSE, a writ of error upon the reversal in the Exchequer-Chamber of the judgment of the court of K. B. being still depending, (*he says*) “that as that case at present stands, it will not settle the general question (agitated in it.) But, if the writ of error should proceed to a hearing, then, (*he observes*) it may be settled, and the whole argument may then be fully stated; but that he
“might

Vide Rep. of
Cases in K. B.
by Sir James
Burrow, vol.
4. p. 2582.

“ might have been thought too tedious
 “ if in its present state, he had gone in-
 “ to a long and voluminous disquisition
 “ of the cited cases. And that, as the
 “ *Judges of the King’s Bench* were above
 “ five hours in delivering *their opinions*, a
 “ particular *report of them* must have run
 “ into a vast length, and have been still
 “ *imperfect* without *adding those delivered*
 “ *in the Exchequer-Chamber* which he did
 “ not hear, and was incapable of re-
 “ porting.”

We have here, it seems, two reasons
 offered by this gentleman, for his re-
 serve upon this occasion; first, that the
 cause of *Perrin v. Blake* has left the
 matter *unsettled*; secondly, that the re-
 port of the *opinions* of the judges of the
 court of King’s Bench must have been
imperfect, without the addition of those
 delivered in the Exchequer-Chamber;
 by which must be understood, that the
former opinions stood in need of the *latter*
 to *round* them, and supply their imper-
 fections. For as to the meer business of
 reporting them accurately such as they
 were, there can be no reason in the
 b 2 world,

world, to doubt the learned Reporter's capacity of doing it with the same perfectness, as the several other cases for which the public stand indebted to his accuracy.

There appears, indeed, something *extraordinary* in the *compliment* to the court of King's Bench, which this gentleman's extreme caution to report nothing but what is *perfect*, seems to have drawn him into; when, by way of an apology for not reporting the arguments and opinions of the court of King's Bench upon their delivering judgment in the case of *Perrin v. Blake*; he reports what differs very little from telling us in PLAIN ENGLISH, that those opinions were too *imperfect* to be reported alone, or to bear printing without being properly corrected, explained and supplied, by *other* opinions afterwards delivered by *other* judges in *another* court, when that very judgment was *reversed*.

But without entering further into this matter; (tho', to say the truth, it seems curious enough) the author of these sheets

heets must candidly declare; that FOR the *very first* of the two reasons assigned by that gentleman, for *suppressing* the arguments and authorities adduced in the case of *Perrin v. Blake*, he has, on the contrary, thought it incumbent on himself to be at some pains in stating them so, as to convey a tolerable idea of the propriety and force of their application; and tho' he was not furnished with such notes of that case, as enabled him to give a *professed* report of it, yet, he has endeavoured to point out the principal grounds, upon which, he understands, the decision of the court of King's Bench appeared to rest; and has also accompanied them, with such observations upon their apparent tendency, as, in his opinion, the occasion seemed to call for.

For, in truth, the considering the question as *unsettled*, appears to him the most obvious reason, why the *Profession* should be more particularly desirous of seeing the arguments and authorities, that have been resorted to on either side; since it is to the strength and operation of these, the question remains open, so
long

long as the expected decision of it, in the case of *Perrin* and *Blake*, stands suspended. It is to these grounds alone, we can in the mean time have recourse for an opinion upon questions of this nature, either in speculation or practice. But should that case ever proceed to a hearing in the House of Lords (which seems to be much doubted) and the question receive a final decision, the several authorities upon which our conclusions in respect to it must *now* intirely rest, will *then* (as to that question) cease to be so material or important; because on the one side they will be *superseded*, and on the other rendered *unnecessary*, by the superior PRECEDENT afforded us in that decision.

But perhaps the idea or mention of a *precedent* may at this day appear *quaint* and *absurd*, and only serve to expose a man to ridicule for his affectation of *obsolete terms*. FOR PRECEDENTS, it must be confessed, seem now to be quite *out of fashion*, and the *old import* of that word almost *forgotten*; and THAT seems to be one of *those* DISPATCHFUL *improvements* of the age, which have drawn from the
judicious

judicious Reporter above mentioned, the following *admirable* observation ; “ We
 “ (says that gentleman) who have seen
 “ some of the *best* of *former times* cannot
 “ help observing the *preference* due to
 “ *these*; and are equally *surprised* at the
 “ multiplicity of business brought before
 “ the court, and the ability and celerity
 “ with which it is *dispatched*, with uni-
 “ versal satisfaction.”

That TEMPORA *mutantur* is indeed a serious truth; and that NOS *mutantur in illis* is a fact which cannot be disputed: we have a lively instance of it, in the opinion of the great *Chief-Justice* of the court of King's Bench of *these times*, upon the case of *Perrin v. Blake*, when compared with the copy introduced in a note (in page 123. of this essay) of the opinion (as it is said) of a very able *Solicitor General* of *former times* upon the same case. And true it also is, that a *multiplicity* of business, *now*, meets with an *unaccountable* kind of DISPATCH, unknown to *former times*, and alarming to *these*, and doubtless *surprisingly satisfactory* to many. But however, though we are *compelled to admit* that times are *much altered*, it is another question, whether

ther that alteration is for the *better*. Nay, that *these times* are really *preferable* to *all* that *went before*, is a position, which favours too much of *pleasantry* to be taken in a serious light. It may, indeed, be the good fortune of some gentlemen, to find their interest in *boasting* such a *preference*; but common decency and good manners will not permit us to reproach *any man's* understanding, with an expectation or idea of obtaining credit for so WILD a CONCEIT.

It is to men that times owe their completion, it is from them they receive their characteristic distinctions; therefore in forming an estimate of the times, we must look to the attributes of those men, whose characters and conduct impart the tinge, and impress the stamp. An inquiry of this kind necessarily opens with this question:

—————*Vir bonus est* QUI ?

To which we find this answer:

QUI consulta patrum QUI leges juraque
SERVAT.

Bream's Buildings,
August, 1776,

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INTRODUCED

OR

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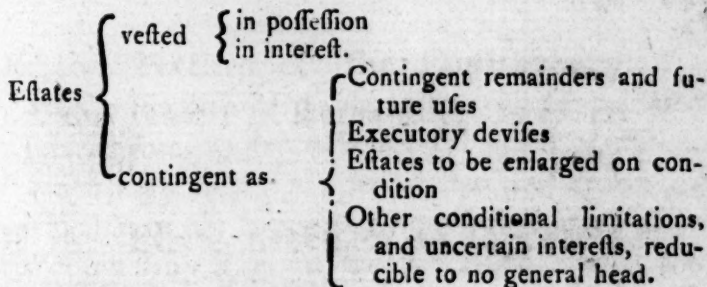
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INTRODUCTION.

INTRODUCTION.

WHEN we consider estates with regard to the certainty and the time of the enjoyment of them, we may distinguish them into



An estate *vested*, is, where there is an immediate fixed right of present or future enjoyment.

An estate *vested in possession*, is, where there exists a right of present enjoyment.

An estate *vested in interest*, is where there is a present fixed right of future enjoyment.

A *contingent estate*, is, where a right is to accrue upon an event which is dubious and uncertain.

The most considerable of the estates which fall under the last description, are *contingent remainders*, and *executory devises*, the proposed subject of the ensuing sheets.

A
CONTINGENT REMAINDER
DEFINED,

AND

ITS SEVERAL KINDS DISTINGUISHED,
&c.

A CONTINGENT REMAINDER, is, a remainder limited so as to depend on an event or condition which may never happen or be performed, or which may not happen or be performed till after the determination of the preceding estate; for if the preceding estate determine before such event or condition happens, the remainder will never take effect; as will appear, when I come to treat of the time when a contingent remainder is to vest.

Under this definition we may properly distinguish four sorts of contingent remainders. *First*, Where the determination of the preceding estate is itself dubious and contingent.—

B 2

Secondly,

Secondly, Where the contingency on which the remainder is to take effect, is independent of the determination of the preceding estate.—*Thirdly*, Where the condition, upon which the remainder is limited, is certain in event, but the determination of the particular estate may happen before it.—*Fourthly*, Where the person to whom the remainder is limited, is not yet ascertained, or not yet in being.

3 Rep. 20.

Poph. 97. Ar-
ton v. Hare.

First, Where the determination of the preceding estate itself depends on an event which may never happen; as if *A.* makes a feoffment to the use of *B.* till *C.* returns from *Rome*, and after such return of *C.* then to remain over in fee; here the particular estate is limited to determine on the return of *C.* an event which possibly may never happen; and therefore the remainder, which depends on such contingent determination of the preceding estate, is dubious and contingent. — So where a fine was levied to the use of *A.* and the heirs male of his body, until he the said *A.* should do such a thing; and after such a thing done by the said *A.* to the use of *B.* in tail: *A.* died without issue, and without performing the condition; and it was adjudged the remainder was contingent, and never took place.

Secondly,

Secondly, Where some uncertain event, un- 3 Rep. 20.
connected with, and collateral to the determi-
nation of the preceding estate, is, by the na-
ture of the limitation, to precede the remain-
der; as if a lease be made to *A.* for life, re-
mainder to *B.* for life, and if *B.* die before *A.*
remainder to *C.* for life, here the event of *B.*'s
dying before *A.* does not in the least affect the
determination of the particular estate, never-
theless it must precede and give effect to *C.*'s
remainder; but such event is dubious, it may
or may not happen, and the remainder
depending on it is therefore contingent. 4 Leon. 237.
So if lands be given to *A.* in tail, and if *B.* pl. 363.
come to *Westminster-hall* such a day, to *B.* in
fee; here *B.*'s coming to *Westminster hall* has
no connection with the determination of *A.*'s
estate; but as it is an uncertain event, and the
remainder to *B.* is not to take place unless it
should happen, such remainder is therefore a con-
tingent remainder.

Thirdly, Where a remainder is limited to
take effect upon an event, which though it cer-
tainly must happen some time or other, yet
may not happen till after the determina- 3 Rep. 20.
tion of the particular estate; as if a lease be
made to *J. S.* for life, and after the death of
J. D. the lands to remain to another in fee;
now it is certain that *J. D.* must die some
time or other, but his death may not happen
till

Polexf. 57. in
the case of
Weale and
Lower.

3 Rep. 20.

till after the determination of the particular estate by the death of *J. S.* and therefore such remainder is contingent.—So in case of a lease for life to *A.* and after the death of *A.* and *M.* the remainder to *B.* in fee, this is a contingent remainder; for the particular estate being only for the life of *A.* and the remainder not commence till after the death of *A.* and *M.*, if *A.* die before *M.* the particular estate will end before the remainder can commence; which is very possible, and therefore such remainder is contingent.—So if a feoffment be to the use of *A.* for 21 years, if he shall so long live, and after his death to the use of *B.* in fee; here *A.* may survive the 21 years; if he should, the particular estate would determine before the remainder could commence, and therefore such remainder is contingent; and being so, is void, for want of a preceding freehold to support it, as will appear hereafter.

3 Rep. 20.
Co. Lit. 378.

Fourthly, Where a remainder is limited to a person not ascertained, or not in being at the time when such limitation is made; as if a lease be made to one for life, remainder to the right heirs of *J. S.* now there can be no such person as the right heir of *J. S.* until the death of *J. S.* (for *nemo est hæres viventis*) which may not happen till after the determination of the particular estate by the death of tenant for life, therefore such remainder is contingent.

gent.—So where a remainder is limited to the first son of *B.* who has no son then born; here *B.* may never have a son, or if he should, the particular estate may determine before the birth of such son, therefore this remainder is contingent.—So if an estate be limited to two for life, remainder to the *survivor* of them in fee, the remainder is contingent, for it is uncertain who will be the survivor.

1 Ventr. 306.

Cro. Car. 102.

It is observable, that contingent remainders appear to have been hitherto distributed into three kinds only; namely, the three last specified in the above division of them. I don't remember to have seen any distinction, made before, of the *first* sort above noticed, though it is obvious it cannot be brought within any one of the *other three* descriptions. But perhaps the instances adduced of this *first* kind of contingent remainders, may at the first glance appear to be cases of *conditional* or *contingent limitations*, not strictly falling within the definition of a *remainder*; it may therefore be proper to obviate any doubt of this nature, by shewing that the cases I have cited, as instances of the *first* of the *four* classes, into which I have distinguished contingent *remainders*, are remainders in the most strict technical sense of that word.

A remainder is defined by Lord Coke, 1 *Inst.*

143. *a.* to be “ a remnant of an estate in
“ lands or tenements, expectant on a particular
“ estate,

“ estate, created together with the same at one “ time.” It follows from this definition, that wherever the *whole fee* is first limited, there can be no remainder in the strict sense of that word; for the whole being first disposed of, no remnant exists to limit over. Therefore, if I limit an estate to the use of *A. and his heirs*, till *C.* returns from *Rome*, and after the return of *C.* to the use of *B.* in fee; here the whole fee being first limited to the use of *A.* there is no remnant left to limit over; and consequently the limitation to *B.* cannot be a *remainder* within the foregoing definition.

But where I limit an estate to the use of *A.* until *C.* returns from *Rome*, and after the return of *C.* to the use of *B.* in fee; here I do not limit the whole fee to the use of *A.* (as in the former case) but only a particular estate to endure till the return of *C.* which being an uncertain period, such particular estate is a freehold; having therefore limited only a particular estate, extending in its first creation no further than to *C.*’s return, the residue of the estate after *C.*’s return, is a remnant of the whole estate in the lands, expectant on that particular estate; and if I at the same time limit this remnant to the use of *B.* and his heirs, it is a *remainder* within the express words of the above definition.

So if I limit an estate to the use of *A.* and the heirs of his body, until *C.* returns
from

from *Rome*, and after *C.*'s return, to the use of *B.* in fee; here, again, I do not limit the whole fee to *A.* but only a portion of it, that is, an estate-tail, determinable on *C.*'s return from *Rome*; and having limited no estate beyond *C.*'s return, the residue of the estate, after *C.*'s return, is a remnant, expectant on the particular estate limited to the use of *A.* which if I at the same time limit to the use of *B.* and his heirs, it comes precisely within the above definition of a remainder. In these cases, the remainder is not limited to take effect at all events, but only on the contingency of the particular estate's determining according to its limitation, on *C.*'s return from *Rome*; which return being an uncertain event, which may or may not happen, the remainder, which depends on its happening, is of course contingent.

The true point of distinction, as I take it, between such conditional limitations over as are, and such as are not remainders, in the strict sense of that word, lies here; the former are limited to commence where the first estate is, by the very nature and extent of its original limitation, to expire or determine; whereas the latter are limited so as to be independent of the measure or extent originally given to the first estate, and so as to take effect in possession, upon an event which may happen, before the regular determination, to which that first estate is liable from the nature of its original limitation.

And

And in this latter case, I apprehend it is the same thing, whether the whole fee is disposed of in the first limitation, or not.

Thus, if I limit an estate to the use of *A.* for life, or to the use of *A.* indefinitely, provided that when *C.* returns from *Rome* it shall henceforth be to the use of *B.* in fee; here the first estate is an estate for the life of *A.* (not an estate limited only till *C.*'s return, as in the former cases;) the remnant therefore of the whole fee in this case is, what remains expectant on the determination of *A.*'s life-estate, by such events as a life-estate is liable to be determined by; and therefore, when after such a limitation to *A.* I limit the use to *B.* from *C.*'s return from *Rome*, and so take up and make such new estate, to commence and take effect in possession, not from any regular determination of the estate before limited to *A.* (his estate being for life, and not merely until *C.*'s return from *Rome*, as in the former cases) but from an event which may happen sooner, it is evident this limitation to the use of *B.* is not confined to the remnant of the estate expectant on the particular estate before given to *A.* but may eventually interfere with, and in part defeat and supersede that first estate, instead of awaiting its regular expiration or determination; and therefore it does not fall within the above definition of a remainder.

Dougl. 727.
n. 1.
Contra.

Every

Every species of contingent remainders may, I apprehend, be reduced to one or other of the four descriptions under which I have arranged them; but although every one of those descriptions seems necessary, in order to comprise in our general distribution every known instance of a contingent remainder; yet we must remember, that several cases which fall literally under one or other of the two last of those four descriptions, are nevertheless ranked among vested estates.

To begin with those cases which are exceptions to the third of the foregoing descriptions, I must observe, that in some cases of a limitation for a long term of years, as 80 or upwards, determinable on the life of a person then in being, with remainder over on the death of that person, to a person *in esse*, (as a limitation to *A.* for 80 years, if *B.* so long live, with remainder over after the death of *B.* to *C.* in fee,) it has been held, that notwithstanding the remainder over is in this case limited to take effect on an event (*viz.* the death of *B.*) which possibly may not happen till after the expiration of the preceding estate for 80 years, yet as the chance against such event's happening before the expiration of the preceding term is exceedingly small, such remainder shall be considered as vested; and that the mere possibility that a life in being may endure for 80 years to come,

come, does not amount to a degree of uncertainty sufficient to constitute a contingent remainder.

Hutt. 119.
Napper v.
Sanders.

Thus, in the case of *Napper* and *Sanders*, where *A.* made a feoffment to the use of herself for life, and after to the use of the feoffees for 80 years, if *B.* and *C.* his wife should so long live, and if *C.* survived *B.* then to the use of her life, for and after the decease of *C.* to the use of *D.* in tail, with other remainders over; the question was, whether the remainders subsequent to the remainder for life of *C.* were contingent or vested? Now this question, we are to observe, must have depended on two points; *first*, Whether the contingency upon which the estate for life of *C.* was limited to depend, *viz.* her surviving her husband, should extend to all the subsequent remainders, and their taking effect depend likewise on that contingency; and *secondly*, Supposing the subsequent remainders were not to depend on the contingency of *C.*'s surviving her husband, but to take place at her decease, let her survive him or not, Then, whether such remainders were not to be deemed contingent, in regard of the possibility of the determination of the preceding estates before the event should happen, on which these remainders were to take effect, *viz.* the death of *C.*; which possibility consisted in this, that
C. and

C. and her husband might both outlive the term of 80 years, and then (supposing *A.* to be dead) it is obvious, there would be no preceding estate subsisting, nor that period yet arrived at which the remainders were limited to take effect.

But, however, it was resolved by all the court, that these remainders were not contingent, but vested presently: though it was agreed that *C.*'s estate for life was contingent on the event of her surviving her husband; and the case of Lord *Derby* was cited, where a feoffment was made to the use of *E.* in tail, with remainder to the use of the feoffee for 80 years, if *H.* should so long live, and after his decease to the use of *F.* in tail, with remainder to the use of Lord *Derby*; and it was adjudged, that the remainder vested presently, and that the possibility that *H.* might have over-lived the 80 years would not make the remainders contingent.

Vid. Lit.
Rep. 370.

So it was said by *Hale C. J.* in the case of *Weale* and *Lower*, that if a feoffment be made to the use of *A.* for 99 years, if he shall so long live, and after his death to the use of *B.* in fee, this shall not be contingent, but it shall be presumed his life will not exceed 99 years; but that it had been otherwise, if it had been made but for 21 years.

Pollexf. 67.

In

Beverly v.
Beverly,
2 Vern. 131.

In a case of this nature in *Chancery*, where *A.* devised lands to *B.* his eldest son, for the term of 60 years, if he should so long live, and from and after his decease to his grandson *D.* (son of the said *B.*) in tail. *B.* and *D.* suffered a recovery; an objection was taken to the recovery, for that the devise to *B.* being only for 60 years, if he should so long live, and after his decease to *D.* the freehold, during the life of *B.* was in abeyance. It was argued that the limitation of the estate-tail was good, expectant on the term of 60 years; and Lord *Derby's* case was cited, as in point, that the devise over, from and immediately after the decease of *B.* ought to be intended of his dying within the term; which was highly presumable, *B.* being then upwards of 40 years of age. But the court held it would be hard to make such construction on the words of the will, as to say, where a term is limited to a man for 60 years, if he shall so long live, and from and after his decease to another, that it must be meant from and after his decease *within the term*; for suppose he out-lived the term, should the remainder-man take in the life-time of the first devisee? That would be a construction contrary to the words and intention of the testator.

In this last case, no objection was taken to the validity of the subsequent limitation to *D.*
on

on the ground of its being a freehold to commence *in futuro*; for this, we are to observe, was the case of a will, where the limitation of a freehold to commence *in futuro* is allowed to take effect under certain restrictions; as will appear, when we come to the chapter of executory devises.

I observed, in the former edition of this Essay, that to give this sort of limitation any effect, a freehold should precede it (unless in some cases of conveyances to uses) in order to prevent any question as to the validity of the limitation of the freehold remainder, on the ground of its being a freehold to commence *in futuro*. And, indeed, in both the cases, of *Nap- pers v. Sanders*, and *Lord Derby*, above cited, a preceding freehold was limited to the feof- for: those cases, therefore, seemed to counten- ance the observation in its full extent; and therefore the case put by *Lord Hale* appearing inconsistent with it, was referred to another principle, upon which it might be supported. But however, upon a further attention to this matter, that observation now appears to me to have been too general; and ought, I conceive, to be restrained to those cases where the term of years is so short, as to leave a common possibility that the life on which it is determinable may ex- ceed it.

Vide p. 12.

13.

It

It is generally true, that in the case of a limitation to *A.* for 21 years, if he shall so long live, and after his death to *B.* in fee, the remainder to *B.* is void, as being a freehold to commence *in futuro*, viz. after the decease of *A.* no freehold having been limited so as to take effect before that period. Because, in this case, it is very possible that the period limited for the remainder to take effect from, viz. the decease of *A.* may not happen till after the determination of the preceding estate, viz. the term of years; in which event the remainder could not take effect at all, as I have already observed in a preceding page. Its taking effect is therefore uncertain, in regard of this possibility of the preceding estate's determining before the event happens from whence the remainder is to commence; and should it take effect at all, it must be *in futuro*; that is, after the event is decided on which its taking effect depends; here, then, being no preceding freehold limited, this remainder (which must take effect at some future period, if at all) is strictly nothing else than a freehold limited to commence *in futuro*.

Vid. p. 3.

It is the allowed common possibility of the life's exceeding the term, which creates such a contingency in respect to the remainder's taking effect, as brings that remainder within the description of a freehold limited to commence *in futuro*, and consequently, within the direct appli-

application of the rule which denies any effect to limitations of that kind.

But where we do not admit such a degree of possibility of the life's exceeding the term, as is supposed sufficient to create a contingency in the remainder, there, I apprehend, the remainder cannot fall within the description of a freehold to commence *in futuro*.

For when we suppose the remainder to be vested, we of consequence admit that it passes immediately, subject to and expectant on the preceding term; for otherwise it cannot be vested; and then it is a freehold commencing *in presenti*, and not *in futuro*. If the life cannot exceed the term, and the term must determine with the life, the limiting an estate to commence from the expiration of the life, is, in effect, limiting it to commence from the determination of the term; in which latter mode of limitation there could exist no doubt of the remainder's passing immediately, and being vested. And upon these principles alone, without recurring to any other, I think the cases put, and distinction taken, by C. J. *Hale*, above cited, may be relied on as law.

But here, perhaps, the case of *Penbay* and *Hurrell*, as reported 2 *Vern.* 370. may, if not considered with some degree of attention, be mistaken as an authority against this doctrine.

Penhay v.
Hurrell, 2
Vern. 370.

C

That

That case, as stated by *Vernon*, was a conveyance by *A.* to the use of the trustees for 70 years, if *A.* should so long live, remainder to trustees for 3000 years, and from and after the death of *A.* to *B.* his son for life, with divers remainders over. The objection was, that the limitation to *B.* together with the remainders over were void, being an estate of freehold to commence *in futuro*; for the first freehold estate was limited to *B.* which was not to arise until the death of *A.* and no estate for life limited to *A.* unless an estate for life should be supposed to result back to him. After solemn argument upon the point, and a case stated to the judges, it was decreed, that an estate for life resulted to *A.* which supported the limitations over. Now the question may be asked, why, if the doctrine just now treated of had been admitted, there could be any occasion to recur to that of resulting uses, in order to support these limitations over, seeing they were preceded by two successive terms, of 70 and 3000 years, which it could not be supposed the life of *A.* could possibly exceed?

Now it is very true, that in this case, there was no room for any contingency in the limitation to *B.* on the score of any supposed possibility of the preceding estates determining before the period when the limitation was to take effect, *viz.* the death of *A.*; it was therefore

fore not to any such contingency, that this limitation owed the quality of a freehold to commence *in futuro*, but to a cause of a very different nature. The truth is, this limitation to *B.* was not a remainder, because it was not limited to commence or take effect when the preceding estates were to determine; there was a preceding term of 3000 years, which was not determinable on the life of *A.* at whose death the limitation to *B.* was to take effect, and therefore this limitation to *B.* which was to take effect without regard to, and at a period different from the determination of the preceding estates, could not be a remainder, within that definition of a remainder which I have considered in a former page.

Vide p. 7 & 8.
supra.

Now as this limitation to *B.* did not pass a remainder expectant on the preceding estates, it could pass no interest at all previous to the decease of *A.*; for the preceding limitations left no interest or estate which could pass immediately, but by way of remainder expectant on their determination; consequently, the limitation to *B.* passing no kind of interest previous to the decease of *A.* must therefore have been considered as a freehold, not passing immediately by way of remainder, as in the former cases, but to commence *in futuro*, viz. after the death of *A.*, unless a preceding freehold

during the life of *A.* had resulted to fill up the chasm, and prevent any interruption or abeyance of the freehold, by connecting itself with the limitation to *B.* as a preceding estate with a remainder.

Had the term of 3000 years been made determinable on *B.*'s life, as the term of 70 years was, this case would have fallen within the reason of the resolutions in the cases of *Napper* and *Sanders*, and of *Lord Derby*; for then as *A.*'s death must have determined both the terms, (and there could be no supposed possibility of his life's exceeding them) an estate to commence at his death would have been the same as an estate to commence from the determination of those terms, and would consequently have amounted to a vested remainder, expectant on those terms.

I hope, I have now sufficiently explained the nature of the exceptions I have been treating of; and shall therefore pass to those cases which are to be excepted from the literal extent of the last of the foregoing descriptions. These will be found to be much more numerous, as they depend, on one hand, on a general rule of law respecting limitations to the heirs general or special, where the ancestor takes an estate or freehold in the same conveyance; and on the other, upon the respect which is paid to the intent of a testator, where it can be plainly collected

lected from his will, that he used the words *heirs of the body*, &c. as a *descriptio personæ*.

Upon the first of these grounds we are to observe, that wherever the ancestor takes an estate of freehold, or frank tenement, and an immediate remainder is thereon limited in the same conveyance to his heirs, or heirs in tail, such remainder is immediately executed in the ancestor so taking the freehold, and therefore is not contingent or in abeyance: as an estate in life to *A.* remainder to the heirs of his body; this is not a contingent remainder to the heir of the body of *A.* but an estate-tail executed in *A.* So likewise, wherever the ancestor by any gift or conveyance takes an estate of freehold, and there is afterwards in the same gift or conveyance a limitation to his right heirs, or heirs in tail, after some other estate for life or in tail interposed between his freehold and such limitation to his heirs, this remainder to his heirs vests in the ancestor as a remainder, and shall not be in contingency or abeyance. As a lease for life with divers remainders over, remainder to the right heirs of first lessee for life, this is a remainder in fee vested in the first lessee for life; and after his death, and the determination of the mean remainders, his heir shall be in as heir, and not as purchaser. So where land is given to *A.* for life, remainder to *B.* for life, remain-
der

2 Roll. Abr.

417.

1 Rep. 104.

1 Inst. 22. b.

2 Roll. Abr.

417.

1 Rep. 104.

Brook, Done,
&c. pl. 11.

Brook,
Nofine, pl. 1.

40.

der to the heirs-male of the body of *A.* who has two sons, the eldest has issue a daughter, and dies, *A.* and *B.* die, the youngest son shall have the land as heir-male; which proves that he takes by descent, and not by purchase, and consequently the estate-tail vested in the father;
 1 *Inf.* 24. b. for had the younger son taken by purchase, he must have been complete heir-general as well as heir-male, which two characters could not be united in him during the life of the eldest son's daughter.

Roll indeed takes a distinction, by saying, that where the frank tenement is so limited to the ancestor, that all the intermediate estates between that and the limitation to his heirs, as well as his own estate, may determine during his life, in that case the limitation to his heirs is a contingent remainder; as if a feoffment be made to the use of *A.* and *B.* during their joint lives, and, after the death of either of them, to the cause of *C.* for life, remainder to the heirs of the body of *B.* this remainder, he says, does not attach in *B.* but as in abeyance; because if *A.* and *C.* die in the life-time of *B.* the estate to *B.* is determined, and the remainder to *C.* ended, and yet the remainder to the heirs of *B.* cannot take effect, because he cannot have an heir during his life. It must be admitted, if the word *heirs* is in this case to be taken as a word of purchase, the remainder
 2 *Roll.* Abr. 418. must

must be contingent, for the reason given by *Roll*; but the question is, whether that word is to be considered as a word of purchase or not?

Now, with regard to this question, I must observe, that *Roll* cites no authority at all for this distinction; and I find it is opposed by two authorities, which are expressly to the contrary: The first is in *Perkins*; if lands be leased unto *A.* and *B.* for the life of *C.* the remainder unto the right heirs of *A.* and *A.* take a wife, and *C.* dieth leaving *A.* and *B.* and *A.* dieth leaving *B.*, the wife of *A.* shall be endowed; because that *cestui que vie* (*C.*) dieth, living *A.* the husband, so as the freehold and inheritance are joined in the husband during the coverture. Here we see the freehold was limited to *A.* only during the life of *C.*, so that it very probably might (and as the case is put, did) determine before the death of *A.*, but notwithstanding he could have no heir at the time when his freehold so determined by the death of *C.*, yet the freehold and inheritance, it seems, became united in him at the death of *C.* consequently the remainder to his right heirs was completely executed in himself by the death of *C.*, and therefore that limitation must have been a vested remainder in its creation; for had it been a contingent estate to the heir of *A.* the inheritance could never have been executed or vested in *A.*

Perk. f. 337.

Consonant

1 Keb. 888.
Merrel v.
Rumsey.
Raym. 126.
Siderf. 247.

Consonant to this is the other case, which is in *Keble*: an estate was limited to husband and wife during their joint lives; and after the decease of either of them, remainder to the heirs of the body of the wife begotten by the husband, remainder to the wife for life. Upon a dispute between the children and the wife, after the death of the husband, whether this was an estate-tail in the wife, or a contingent remainder in the children, *Keeling* conceived it an estate-tail, executed *sub modo*, not presently, by severance of the jointure, as it would be by a several conveyance, but upon the death of him whose life kept the estates asunder, they were united and executed; and the court agreed there was no contingency either in estate or person, and that an estate to a woman *durante viduitate*, remainder to the heirs of her body, is an estate-tail in the woman. In this case likewise, we observe, that the freehold which the wife took by the limitation was only for the joint lives of herself and husband, and consequently must determine in her lifetime, if her husband should die before her; and then she could have no heir of her body when it determined: the case actually so happened; yet we find it was adjudged an estate-tail in the wife. The like observation may be made as to an estate to a woman *durante viduitate*, remainder to the heirs of her body: her freehold may determine before she may have
any

any heir of her body; nevertheless the court held such a limitation to be an estate tail. In the case put by *Roll*, there is an intermediate remainder to C. for life, but the only difference to be inferred on that account (if we reason by analogy to the cases where the ancestor takes the freehold for his own life) is, that the limitation vests in that case as a remainder, instead of being executed in possession, as it was in the latter cases which I have cited.

Upon the whole; from the authority of the last cases, it seems, that the possibility of the freehold's determining in the life of the ancestor who takes it, does not keep the subsequent limitation to his heirs from vesting in himself; and therefore, I think, we may venture to lay it down as a general rule, that whensoever the ancestor takes any estate of freehold, whether for his own life or the life of another, or whether it be of such a nature that it may determine in his life-time or not, and there is afterwards, in the same conveyance, a limitation to his right heirs or heirs in tail, (either immediately, without the intervention of any mean estate of freehold between his freehold and the subsequent limitation to his heirs, or mediately, that is, with the interposition of some such mean estate) there such subsequent limitation to the heirs, or heirs in tail, vests immediately in the ancestor, and
does

And vid.
Brook,
Estates, 76.

does not remain in contingency or abeyance; with this distinction, that where such subsequent limitation is immediate, it then executes in the ancestor, and becomes united to his particular freehold, forming therewith one estate of inheritance in possession; but where such limitation is mediate, it is then a remainder vested in the ancestor who takes the freehold, not to be executed in possession till the determination of the preceding mean estates.—As if there be an estate to *A.* for his life, or during the life of *C.* or any other sole estate of freehold, remainder to the heirs of the body of *A.* this is an estate-tail executed in *A.*; but if there be an estate to *A.* for his life, or during the life of *C.* or any other estate of freehold, remainder to *B.* for life, remainder to the heirs of the body of *A.* this is only a present freehold in *A.* with a vested remainder to him in tail, to take effect in possession after the determination of *B.*'s estate.

1 Inst. 184.
Perk. f. 334,
337. and
vid. Merrel
v. Rumsey,
supra, p. 24.
and King v.
Edwards, in-
fra, p. 29.

If the particular estate were to *A.* and *B.* jointly for their lives, remainder to the heirs of the body of *B.* this would be an estate-tail in *B.* executed *sub modo*, so as not to sever the jointure, nor intitle the wife of *B.* to dower.

Here it is to be observed, that cases may arise where the estate of freehold limited to the ancestor may be so limited to him *in trust* for some

some *other person*, or as a *security* for some charge, or to answer some other *particular* purpose, and no *usufructuary benefit* be intended to the ancestor by such limitation: As a limitation to the *use* of *A. during the life of B.* (his sister, suppose) in *trust for B.* or to *pay her the rents and profits* during her life, remainder to the *use of the heirs of the body of A.*; and some other cases which might be put, and which, though I don't recollect to have met with in our books, have occasionally occurred to me in the course of practice. Now these are cases which, I don't see, how we are to consider as falling within the extent or application of the rule I have been treating of; because it seems absurd, and inconsistent with any possible rule of law or common sense, to create or raise an estate-tail to a man upon the ground of a limitation (*viz.* the freehold limited *in trust*) by which *no beneficial interest at all* was intended him.

This general rule of law, respecting the subsequent limitation to the heirs of the body, &c. vesting in the ancestor, where he takes a preceding freehold by the same conveyance, does not operate so as absolutely to merge the particular estate of freehold, where the limitations intervening between the preceding freehold, and such subsequent limitation to the heirs, &c. are contingent; because that would destroy such *intervening* limitations; but the two limitations are united and executed in the ancestor,

And Vide Lit. Rep. 258. some cases put *arguendo* of the heir's taking by purchase, because of the impossibility of the remainder's vesting and uniting with the freehold in the ancestor's lifetime, which however is directly contradicted by the authority of Lord Coke, 1 Inst. 378. b. in the case there put, and cited *infra*, p. 237.

11 Rep. 80.
Lewis
Bowles's
Case.

cestor, only until such time as the intervening limitations become vested; and then open and become separated, in order to admit such *intervening* limitations as they arise. Thus, where there was a limitation to *baron* and *feme*, for their lives, remainder to the first and other sons of the marriage successively in tail, remainder to the heirs-male of the bodies of the *baron* and *feme*; the court resolved that it was an estate-tail executed in the *baron* and *feme*, *sub modo*, that is so as not to merge the estates for life absolutely, but executed only till the birth of the first son, and that then the estates should become divided by operation of law, and the *baron* and *feme* become tenants for their lives, with remainder to their first and other sons, remainder to *baron* and *feme* in tail.

Brook Estate,
P. 75.

In this last case, we observe, that the limitation of the freehold was a *joint* limitation to husband and wife, and the subsequent limitation to the heirs of their bodies became united to it and executed in them *jointly*; because that subsequent limitation was of the same quality with the first, that is, a *joint* limitation. For the same reason, a limitation to *baron* and *feme* for their lives and the life of the survivor of them, remainder to the heirs of their bodies, is an estate-tail executed in them; *both* limitations being *joint*. But there is a difference where both the limitations are *not joint* limitations; as where the limitation was to *baron* for life, remainder to *wife* for life, remainder to the heirs of their bodies,

bodies, it seems the estate-tail was not executed in them in possession, but only vested in them as a remainder; because the limitation to their heirs being a joint limitation to them, did not correspond with the quality of their estates for life, which were distinct and successive, and consequently they had several estates for life, with a joint remainder in tail.

But a limitation to *baron* and *feme*, and the heirs of the body of the *baron*, is an estate-tail executed in the *baron*, for here is no contingency to suspend the vesting of the estate; for whether the *baron* or *feme* die first, the *baron* may equally have an heir of his body, upon the determination of the first limitation. And accordingly three judges held the estate-tail so executed in possession, that the feoffment of the *baron* was a discontinuance.

If there be a limitation to the *feme* for life, remainder to the heirs of the body of *baron* and *feme*, this is no vested remainder in the *feme*, for the freehold is limited to her alone; and as the person who is to take in remainder must be heir of both their bodies, if the *feme* should die before the *baron*, there can be no one to answer that description when the particular estate determines, because the *baron* cannot have an heir during his life; therefore the remainder is in contingency. So in the case of *Goffage v. Taylor*, where an estate for life was limited (but Q? and see the case) to S. wife

1 Lev. 36.
Raym. 36.
Stephens v.
Bretridge.

Vide infra,
Sutton, v.
Stone.

Vide supra,
p. 26. the
case of a joint
freehold.

Cro. Car.
321. King v.
Edwards.

2 Roll. Abr.
p. 417. H.
pl. 1, 2.

Vide infra,
Frogmorton
v. Wharrey,
and Lane v.
Pannel.

Stiles's Rep.
325. Goffage
v. Taylor.

of

of *L.* remainder to the heirs to be begotten upon the body of *S.* by *L.* her husband, no estate being previously limited to the husband himself, it was held that the word *heirs* related to both their bodies, and consequently did not create an estate-tail in *S.* We are to distinguish the reason of these last cases, from that above noticed, where the limitation to the heirs, &c. is held to vest, notwithstanding the ancestor's freehold may determine in his lifetime; the limitation there is to the heirs of the body, &c. of the ancestor only, but here it is to the heirs of the body, &c. of the ancestor and of her *baron*; and though every person may so far be supposed to carry his own heirs, &c. in himself during his life, as that a limitation to them where he takes a preceding freehold, may vest in himself; yet no person can be supposed to carry in himself the heirs, &c. of himself and of some body else.

It is immaterial, with respect to the operation of the general rule of which I am now treating, whether the ancestor takes the freehold by express limitation or by implication; in either case the subsequent remainder to his heirs equally vests in himself; as in the case of *Pybus* and *Mitford*, where *A.* seised in fee, covenanted to stand seised to the use of *his heirs-male begotten, or to be begotten, on the body of his second wife*; here, upon

upon the principle laid down by my Lord Coke, 1 *Inst.* 23. a. *that so much of the use as the owner of the land does not dispose of, remains in him*, *A.* was held by Hale C. J. and two other judges, to take an estate for his own life by implication; for the limitation being to the heirs of his body, &c. and it being impossible for him to have any such heir during his life, the use during his life was undisposed of. And an estate by operation of law being considered as equivalent to an estate by deed; it was held, that the subsequent limitation to his heirs-male, &c. was executed on the estate for life which he had by implication, and created an estate-tail in *A.*

But where the legal estate is limited away during the life of the covenantor or feoffor, the freehold cannot result by implication, and consequently the subsequent limitation to his heirs, &c. will be a contingent estate.

As where a marriage-settlement was made by a third person, to the use of *A.* the husband for 99 years, remainder to trustees during his life to support contingent remainders, remainder to the wife for life, remainder to the first, &c. son of the marriage, remainder to the heirs of the body of *A.* remainder to his right heirs; here the freehold, during *A.*'s life, being

Vide 1 P. W. 359. Sir T. Tippen's Case there cited; and vide Jenk. Cent. 248. c. 18.

ing limited to trustees, and he taking only a term of years, and the estate not moving from him, (for if it had, the remainder to his right heirs would have been the old reversion) the limitation to his heirs was a contingent remainder.

1 P. W. 387.
Else v. Osborne.

So where *A.* made a settlement to the use of himself for 99 years, if he should so long live, remainder to trustees and their heirs during his life, &c. remainder to the use of the heirs of his body, remainder to himself in fee; this limitation to the heirs of his body was plainly a contingent remainder. *Per Lord Chancellor Cowper.*

2 Mod. 207.
211. South-
cot v. Stowel.

So where *A.* having two sons, *C.* and *D.* covenanted to stand seised to the use of *C.* and the heirs-male of his body on *M.* his wife to be begotten, and for want of such issue to the heirs-male of the covenantor, and for want of such issue to his own right heirs for ever; *C.* the eldest son died, leaving issue one son and several daughters, *A.* died, and then the son of *C.* died without issue; the question was, how *D.* could be let into the estate, under the limitation to the heirs-male of the father *A.*? for by way of purchase, he could not be intitled, not being complete heir whilst his nieces were living; it was therefore contended, that *A.* took an estate for life by implication,

tion, and consequently, that the limitation to his heirs-male vested in himself as an estate-tail, and so descended to *D.* as special heir. But the court held that limitation to be words of purchase, and to vest in the son *C.* upon the death of *A.* as heir-male of his body by purchase; and that on the death of *C.*'s son it descended to his uncle *D.* as heir-male of the body of *A.* *per formam doni*; they allowed no estate for life in *A.* by implication, and seemed to doubt the doctrine, in the case of *Pybus* and *Mitford*.

But we may observe this judgment did not in the least affect or clash with the judgment in the case of *Pybus* and *Mitford*; for there the covenantor had not limited any use at all, during his own life; the limitation to his heirs-male was a future limitation; whereas in this case, the covenantor had limited a present use to his son *C.* in tail, and therefore the freehold being so actually limited away, could by no implication be supposed to remain in the covenantor. In this manner, the two cases of *Pybus v. Mitford*, and *Southcot v. Stowel*, are easily reconciled; and so far are they from being authorities contrary to each other, which for want of attention they are sometimes taken to be, that it appears they are both express authorities for, and equally confirm the distinction before taken; *viz.* that where the use of the freehold is not

D limited

limited away, it results to the covenantor or feoffor, by operation of law; but that where it is limited away, the covenantor or feoffor, shall take no estate for life by implication.

So where the ancestor takes only an *equitable* or *trust* estate of freehold, and the subsequent limitation to the heirs, &c. carries the *legal* estate, these two estates, it seems, being of such different qualities, *i. e.* one being an *equitable*, and the other a *legal* estate, will not unite and incorporate together into one estate, so as to vest the subsequent limitation in the ancestor, as (in general) would have been the case if they had been both of one quality, that is, both legal, or both equitable; but the subsequent limitation to the heirs, &c. will remain distinct from the freehold, and operate as a contingent remainder.

Carth. 272.
Tippin v.
Cofin.

As where *A.* made a settlement to the use of himself and his heirs until his then intended marriage, and afterwards to the use of his wife for life, and after her decease *to the use of trustees* and their heirs, during his own life upon trust to permit and suffer *A.* to take the profits, remainder to the first and other sons of the marriage, &c. remainder *to* (the use of) *the heirs of the body of A.*; it was adjudged, that the limitation to the heirs of the body of *A.* operated as words of purchase, and of course created a contingent remainder; because

cause *A.* took only a *trust* estate for life, the use being limited to the trustees for his life, and of consequence the legal estate for his life executed in them by the statute of uses.

And again, where a testatrix devised certain real estates to trustees and their heirs, upon trust and in confidence, in the first place, out of the rents and profits thereof to pay the several legacies, devises, and bequests therein-after-mentioned, and then, (after giving several annuities for life,) she appointed her trustees to pay all the rest and residue of the rents and profits of the premises to the proper hands of her daughter *C. F.* or as she by any writing, &c. should appoint, for and during the term of her natural life; and after her (the said daughter's) decease, the trustees to stand seized of the premises to the use of the heirs of the body of her said daughter *C. F.* severally and successively as they should happen to be in priority of birth and seniority of age, and to the heirs of their respective bodies in tail-general, subject to the payment of the several annuities. And in case of failure of the issue of the body of her said daughter *C. F.* then to the use of Lady *J.* After the decease of the testatrix, *C. F.* and her husband suffered a recovery of the lands, and she afterwards died without issue; upon her decease Lady *J.* claimed

Vin.
vol. 8. fol.
262. col. 19.
Lady Jone
Lord Say and
Seal.

the lands under the will, by virtue of the said remainder thereby limited to her.

It was contended for the plaintiff (Lady J.) that C. F. took only a trust-estate for life by the will, with a contingent remainder to the heirs of her body in tail-general; that the direction to the trustees to pay the residue of the rents, &c. to the proper hands of C. F. who was a married woman, gave her a mere *trust*, and not a *use* executed by the statute. It was a trust for her separate use, and to construe it an use executed, would be to subject it to the power and control of her husband. That the subsequent limitation to the heirs of her body severally, &c. was a use executed by the statute, and could not be consolidated with the precedent *trust* limited to C. F. for life, so as to create an estate-tail in her: That the subsequent words, *in case of failure of issue of the body of C. F. then to Lady J. &c.* did not create an estate-tail in C. F. by implication, nor enlarge the precedent estate, because no legal estate vested in C. F.—On the other side, it was asked, if the first estate devised to C. F. were a trust, why was not the subsequent limitation to the heirs of her body a trust likewise? And it was contended, that the legal estate passed to the trustees and their heirs, and if it passed in fee, then all the subsequent *uses* were *uses upon a use*, and consequently *trusts*

trusts not executed by the statute; and if the estate given to C. F. for life, and the subsequent limitation to the heirs of her body, were both trusts, they might be consolidated together, and create an equitable estate-tail; and that in this case, either both the estates were executed, or neither.

After hearing the arguments, Lord Chancellor King was of opinion, that by the words of the will the use was executed in the trustees and their heirs *during the life of C. F.* and that she had only a *trust* in the surplus of the rents and profits during her life; but that by the subsequent words, *viz. that the trustees should stand seised to the use of the heirs of the body of C. F. subject to the payment of the annuities, &c.* the use was executed in the persons intitled to take by virtue thereof, chargeable with the payment of the annuities; and therefore, there being only a *trust-estate* in the ancestor, and an *use executed* in the heirs of her body, those different interests could not unite, so as to create an estate-tail by operation of law in the ancestor; and he decreed accordingly for the plaintiff.

In the cases where the first use was limited away for a term of years, it was a matter of great doubt, whether the freehold resulted to the feoffor or covenantor, or not; and indeed, in the case of *Penhay v. Hurrell*, (cited in a former

Vide p. 17.
supra.

Penhay v.
Hurrell.

2 Freem. 231,
235. 258
2 Vern. 370.

former page) where *A.* seised in fee, by deed and fine conveyed to the use of trustees, for 70 years, if *A.* should so long live, remainder to trustees for 3000 years, and from and after the death of *A.* then to the use of *B.*; in which case it was objected, that the limitation to *B.* must be void, as being a freehold to commence *in futuro*, viz. not till after the death of *A.* there being no freehold limited to take effect until that event: Lord Keeper, after much consideration, and a case stated to the Judges, gave his opinion, that *A.* had an estate for life by implication, and so all the limitations over were good, there being a freehold to support them.

It is obvious, that if this doctrine were established throughout, there could rarely be such a thing as a contingent remainder's failing for want of a sufficient preceding estate; for in most limitations by way of use, if no sufficient particular estate were expressly limited, such a one would nevertheless arise by way of resulting use. It was indeed agreed, that if the limitation had been by way of *covenant to stand seised*, the covenantor would have had the freehold by implication, because he had never departed with it; but the question was, whether in the case where the conveyance to uses enured by way of transmutation of possession, as by *fine* or *feoffment*, &c. the use should result, and be implied out of the

the seisin of the feoffees or devisees, and upon the strength of Lord Coke's opinion in the case of *Penwick v. Mitford*, and the concurrent authority of Lord Chief Justice Hale's opinion, in the case of *Pybus v. Mitford* before cited, that as well in a fine or feoffment, as in a covenant to stand seised to uses, so much of the use as a man does not limit away remains in him, the above case was solemnly determined in the manner I have mentioned.

2 Rep 91. b.
1 Inst. 22. b.
& 23. a.
Vide p. 30.
supra.

I have, in a preceding page, pretty explicitly pointed out the distinction between the case of *Penhay* and *Hurrell*, and the cases of *Napper* and *Sanders* before cited, and shewn that the question in the former arose upon a ground, the admission of which did not at all interfere with the resolutions in the two latter. Therefore I shall only observe in this place, that the principle on which the limitation to *B.* in the case of *Penhay* and *Hurrell*, was supported and decreed to be valid, might be applied to the case put by *Hale C. J.* before cited, and I actually referred to it in the former edition of this Essay, as the principle upon which that case must depend. But it now appears to me, for the reasons which I have before delivered, and to which I here refer the reader, that the case put by *C. J. Hale* is good law, within the resolutions in the cases of *Napper* and *Sanders*, and Lord *Derby*,

Vide p. 18,
19. supra.

Vide p. 13,
supra.

Derby, and depends upon the very same principles as those resolutions were grounded upon; and that there is no sort of occasion to recur to any other doctrine than what was admitted and established in those cases, to support and account for the case and distinction so put by Lord *Hale*, as I have before observed in its proper place.

Vide p. 17.
supra.

Vide p. 38.
supra.

It was observed above, upon the case of *Penhay* and *Hurrell*, that if the doctrine which prevailed in that case were established throughout, there could scarcely be such a thing as a contingent remainder's failing for want of a sufficient preceding estate, because such a preceding estate might be supplied by way of resulting use. But the following case is an instance to which that doctrine was not allowed to extend, and will serve to point out the distinction between those cases where an estate for life may result, and those wherein it may not.—The case was this: *S.* being seised in fee, conveyed to trustees and their heirs, to the use of himself for 99 years, remainder to the use of the trustees for 25 years, remainder to (the use of) *the heirs male of his own body*, remainder to his own right heirs. The question was, whether *S.* was tenant in tail, or only tenant for years? And the court held the limitation to the heirs male of the body to be void, because there was no preceding freehold limited

2 Salk. 679.
Adams v.
Savage.

And vide
Dyer 111.
in margine.

limited to support it, and it should not be implied contrary to the intent of the conveyance; and if it could be implied, it must be out of the estate given to the heirs of the body, which could not be, because this was a new use; whereas a resulting use is always from the old estate, and parcel of the old use; and here the estate took effect by transmutation of possession out of the seisin of the trustees; and not like *Ferwick* and *Mitford's* case, where the owner covenanted to stand seised to the heirs of his body; and yet, *per Powell J.* even in that case, if there had been an express estate limited to the covenantor, it had been otherwise.

Now there is this distinction observable between this case and the case of *Penhay* and *Hurrell*; in the case of *Penhay* and *Hurrell*, though a present use was limited away for years, yet no use at all was limited to the grantor, and therefore nothing appeared to rebut the implication, that he should take the use of the present freehold, which was not limited away; whereas in this case, the use was expressly limited to the grantor for years; now if he had taken the freehold by implication, this use for years would have been merged in it, which would be raising an estate by implication, to destroy an estate expressly limited in the deed; directly contrary to the nature

nature of implication, which can only take effect either as the import of what is expressed, or as an inference from something not being expressed.

Salk. 675.
Davies v.
Speed.

So no estate for life can arise by implication, or by way of resulting use, to a person who was not the owner of the estate granted: As where husband and wife levied a fine of the wife's land to the use of the heirs of the body of the husband on the wife begotten, remainder to the husband in fee; they had issue; the wife died, then the issue died, and then the husband died; and the question was, whether the heir of the husband or the heir of the wife should have the lands? And the court held, that no estate for life could arise to the husband by implication, because the estate was the wife's, to which he was a stranger; therefore the limitation to the heirs of the body of the husband, &c. was void, for want of a preceding freehold to support it, and the remainder in fee void for the same reason.

Vide same
case cited
infra.

Moor 284.
Fenwick v.
Mitford.

But where there is a limitation to the right heirs of the grantor, it will continue in himself as the reversion in fee, and is not a remainder, although the freehold is expressly limited from him: As where a fine was levied to the use of the wife of conusor for life, remainder to the use of B. in tail, remainder to the use of the right heirs of conusor,

for, this was adjudged a reversion in the co-
nutor.

So where *A.* infeoffed *J. S.* and *J. N.* in
fee to the use of himself for 40 years, without
impeachment of waste during the life of *A.*
and afterwards to the use of *C.* second son of
A. in tail-male, remainder to the use of the
right heirs of *A.* for ever; it was resolved, that
the use limited to the right heirs of *A.* was the
old use; that it was void as a remainder, and
was the reversion in *A.*

So in the case of *Sir T. Tippen*, before cited,
though the first limitation to the husband was
only for years, yet if the estate had moved
from him, the remainder to his right heirs
would have been his old reversion.

But this difference is to be observed between
a subsequent limitation to the heirs special and
one to the heirs general; in cases where the
freehold is limited away from the ancestor,
(the estate moving from him) the limitation
to the heirs general, we have seen, is his old
reversion; but the limitation to his heirs special
is in the same case a contingent remainder, as
appears by the case of *Elfe* and *Osborne*, above
cited.

It appears, that this rule of the subsequent
limitation to the heirs, &c. vesting in the an-
cestor

Jenk. Cent.
248. c. 18.
Moor 718.
Earl of Bed-
ford's Case.
Vide also 2
Rep. 91. b.
Cro. Eliz.
334.

Vide 1 P. W.
359. Sir T.
Tippen's
Case. Vide
p. 31. supra.

1 P. W. 387.
*Elfe v. Os-
borne.* Vide
p. 32. supra.

Vide Gilb.
Ten. 254.

Vide Case of
Allen v. Pal-
mer, 1 Leon.
101.

2 Roll. Abr.
794. p. 6.
Style 244.
273. Pauley
v. Lowdall.

2 Atkyns 101.
Sutton v.
Stone.

cessor when he takes a preceding freehold, prevails in the limitations upon surrenders of copyholds. As where a man surrenders to the use of himself for life, remainder to another in tail, remainder to the right heirs of the surrenderor; there his heirs shall have it by descent, *per Coke*. And so where *A.* seised of a copyhold in fee, surrendered it to the use of his will, and afterwards devised it to *B.* for life, the remainder to the heirs of his body begotten; it was adjudged, that this limitation gave a fee-simple conditional to *B.*

There is a case noticed by *Atkyns*, where, upon a surrender of a copyhold to the use of the husband for life, then of the wife for life, and of the heirs of the bodies of the husband and wife, remainder in fee to the use of the survivor, it is said, the limitation did not vest an absolute estate tail in the wife who survived, but only gave her an estate-tail *after possibility of issue extinct*, and that the estate-tail vested in the person who was heir of the bodies of both husband and wife; the reasons for this opinion are not mentioned, nor indeed is it stated that it was the resolution of the court; nor does it appear whether that point entered the question then before the court; and I must confess, I think it is no easy matter to account for such an opinion, or even reconcile it to itself in all its points. The limitation to the heirs of the bodies of the *baron* and *feme*,

feme, must, as I take it, either have been executed in the *baron* and *feme* jointly as an estate-tail in possession, or have vested in them jointly as a remainder, or have been a contingent limitation to the heir of both their bodies; in the first case, the estate-tail in possession would have survived to the wife on her husband's death; in the second, the joint remainder in tail surviving to her, would have merged her estate for life, and she would thereby have become tenant in tail in possession; and in neither of these two cases, could she be tenant in tail *after possibility of issue extinct*, so long as any issue of her body by her deceased husband was living; for neither husband nor wife tenants in special tail, are tenants in tail *after possibility of issue extinct*, till the death of the other of them, and failure of issue of their two bodies, (*vid. 1 Inst. 27. b.*) and if there were any such issue then living, it could not vest in such issue till her death. In the third case, she could take no estate tail at all, and consequently could not be tenant in tail *after possibility of issue extinct*; therefore the only cases in which she could be tenant in tail *after possibility of issue extinct*, were those two, in which it was impossible there should be any such person at all, as the heir of both their bodies. Its being a surrender of a copyhold, made no difference in the construction; as it was agreed in the same case, that

that surrenders of copyholds should be construed as other conveyances at common law:

Vide supra,
p. 29.
Stephens v.
Bretnidge.

The resolution in this case, upon common law principles, I apprehend, must have been thus: the husband and wife taking distinct and successive estates for life, the joint limitation to the heirs of their bodies was not executed in them, but vested in them jointly, as a remainder in tail, this remainder survived to the wife upon the decease of her husband, and merging her estate for life, made her tenant in tail in possession; but having had no issue by her deceased husband, or such issue being extinct at the time of this resolution, she thereby became only tenant in tail *after possibility of issue extinct*.

Vide p. 29.
supra.

But where an estate for life is limited either to the father or mother only, and the subsequent limitation is to the heirs of both their bodies, the construction is the same in regard to copyholds, as we have before shewn it to be in the case of freeholds, viz. the subsequent limitation does not vest in the ancestor taking the estate for life, but is a contingent remainder to the heirs of the bodies of both father and mother.

Lane v.
Pannel.
1 Roll. Rep.
238, 317,
438.

As where *A.* seised of copyhold-lands in fee surrendered them to the use of *D.* and of the wife of *A.* for their lives, and afterwards to the

the use of the heirs of the bodies of A. and his wife, upon a question in ejectment, whether this subsequent limitation to the heirs of the body of A. and his wife vested an estate-tail in the wife of A. it was held that it did not, but was a contingent remainder to the heirs of both their bodies.

So again in a very late case reported by Serjeant *Wilson*, where J. S. being seised in fee of copyhold lands according to the custom of the manor, surrendered the same to the use of M. his then intended wife, and the heirs of their two bodies lawfully to be begotten, and for default of such issue, to the use of the right heirs of the said J. S. The marriage took effect, and afterwards M. was admitted tenant to the lands according to the surrender. Upon a trial in ejectment at the assizes, the question was, what estate the wife took under the surrender? It was contended for the plaintiff in the cause, that this was an estate in special-tail executed in M. the wife; on the defendant's side it was insisted, that M. only took an estate for life, with contingent remainder to the heirs of the bodies of the husband and wife, and upon a case stated for the opinion of the court of Common Pleas, that court, after hearing two arguments, and taking time to consider, determined in favour of the defendant.

But

3 Will. 125.
144. Frog-
morton
v. Wharrey.

But here, it is to be observed, a distinction was taken by *Coke*, between a limitation upon a surrender by a copyholder in fee to his own heirs-general, where he takes a preceding estate of freehold himself, and the like limitation where he takes no preceding freehold estate; a distinction which certainly has no place in respect to freeholds. In freeholds, we have seen, where the estate moves from the grantor, the ultimate limitation to his heirs-general, though the ancestor takes no preceding freehold, will be a reversion in him, and part of the old estate, and the heir will take it by descent; but in respect to copyholds, *Coke* held it to be otherwise. As where a copyholder surrendered his lands to the use of a stranger for life, remainder to the use of the right heirs of the copyholder, who afterwards surrendered his (supposed) reversion to the use of a stranger in fee, and died, and the tenant for life died, and the right heir of the copyholder entered. *Per Coke*—Nothing remained in the copyholder upon his first surrender; but the fee was reserved to his right heirs; for, said *Coke*, if he had not made any second surrender, his heirs would be in, not by descent, but by purchase; and, he said, the common difference was, that where the surrender was to the use of himself for life, and afterwards to another in tail, the remainder to the right heirs of the surrenderor, there the heirs should

Vide p. 42.
supra.

Allen v. Palmer,
1 Leon. 101. c. 132.

should have it by descent, but otherwise where the surrenderor had not an estate for life or in tail limited to him, for then his heir should enter as a purchaser, as if such use had been limited to the right heirs of a stranger.

Vide Gilb.
Ten. 256.

The only ground upon which I can account for *Coke's* opinion, that the heir should take by purchase and not by descent, in the case where copyhold lands are limited back to the heirs of the surrenderor, he taking no preceding estate of freehold, is, the supposition that an intire new estate is created and derived under the uses of the surrender, throughout the whole of them, and that no estate taken under those uses is any part of the old estate; and, indeed, if we hold that the uses of a surrender must derive their effect from an admittance, (for till then it seems agreed that the old estate remains in the surrenderor) which admittance is in fact a new copy or grant from the lord, it seems to follow, that the estates derived under, and held by such new copy or grant, are, strictly speaking, new estates.

But this old notion, that the estates derived under the use of a surrender, are entirely and throughout new estates, even where the fee is limited back to the surrenderor, seems to be exploded by a very late decision in the Common Pleas; where *S.* being seised in fee as a copyholder, surrendered the lands to the use

Thrustout v.
Cunningham,
Mich. Term.
1775.

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of

of *T.* and *E.* his wife, during their lives, and the life of the longer liver of them, and afterwards to the use of the right heirs and assigns of the said *T.* for ever. At the same court *T.* and *E.* were admitted to hold to them and the heirs of the said *T.* according to the surrender, and then at the same court *T.* surrendered the lands to the use of his will; *E.* died, leaving her husband *T.* and issue by him, two sons, *A.* and *B.*; afterwards *T.* upon an intended marriage with *S.* surrendered the same lands into the hands of the lord, to the intent that the lord should regrant the same to and for the several estates, uses, &c. following, *viz.* to the use of *T.* and his heirs till the marriage; and after the solemnization thereof, to the use of *T.* and *S.* his wife during their natural lives, and the life of the longer liver of them, and after the decease of the longer liver of them, to the heirs of their two bodies lawfully to be begotten, and for want of such issue, *to the right heirs of the said T. for ever*, and to or for no other use or uses, estate or estates, intents or purposes whatsoever. The marriage between *T.* and *S.* soon after took effect, but no admittance was ever had under the last surrender during their joint lives.

After the marriage *T.* made his will, by which he devised the lands to *S.* his wife for life,

life, and after her decease to *B.* his youngest son and *M.* his wife, for their lives and the life of the longest liver of them; afterwards *T.* died, leaving *S.* his widow without any issue by her; *S.* was afterwards admitted to the lands by virtue of the last surrender, to hold to her and her assigns according to the said surrender; and some time after *A.* the eldest son, and heir at law of the said testator, was admitted to the reversion in fee expectant on the decease of the said *S.*; afterwards, upon the death of *S.*, *B.* the youngest son of the said testator being then dead, his widow *M.* was admitted for her life under the testator's will, and the first surrender to the use thereof, and brought ejectment for the lands against the defendant, who claimed under *A.* the testator's heir at law. Upon the trial at the assizes, a verdict was found for the plaintiff, subject to the opinion of the court of C. P.

It was contended for the plaintiff, that the uses of the last surrender created new estates so far only as they differed from the estate which was in the surrenderor at the time of that surrender; that no alteration of the old estate was effected by that surrender, further than to supply the estates limited by that surrender to *T.* and his wife *S.* and the heirs of their two bodies; that the ultimate limitation

to the *heirs* of the surrenderor was part of his old estate, which he had in him at the time of the first surrender to the use of his will, and as such, it continued subject to be disposed of by his will under that surrender: That *T.* dying without issue by *S.* the devise to his youngest son *B.* and his wife *M.* after the decease of *S.* the testator's widow, was a disposition out of that reversion in fee, which was part of his old estate passed by the said surrender to the use of his will; and therefore *M.* the widow of *B.* was intitled under the said will, and surrender so made to the use of it.

On the other hand it was contended, that the estates derived under the new surrender upon the second marriage were new estates throughout, and among the rest, the limitation to the heirs of *T.* was a new estate in remainder in fee acquired to him, and was no part of the estate which he had before surrendered to the use of his will, and consequently could not be affected by that surrender; and therefore *T.* not having surrendered this new estate to the use of his will, was not enabled to devise it from his heir at law. That though *T.* was never admitted under the last surrender, yet the admittance of his widow after his decease under that surrender being the admittance of those intitled in remainder under the same surrender (namely, the right heirs
of

of the testator), the heir by that admittance came in of the new remainder in fee limited to his father by the uses of the surrender to which that admittance related; that although the old estate remained in the surrenderor till the admittance under the new surrender, yet after the admittance of the widow, the old estate had no longer any existence at all, that admittance having completely passed the lands to the uses of the last surrender under which *A.* the eldest son was intitled to the land as heir at law to his father.

But it was the unanimous opinion of the court, that the limitation to the right heirs of *T.* in the last surrender, was part of his old estate, and as such, that he was well enabled to devise it by the former surrender to the use of his will; and the court accordingly gave judgment for the plaintiff.

It is obvious, that in the above case the will being subsequent to the surrender made upon the marriage, the question did not properly turn upon the doctrine of revocation of wills; but the doubt was as to the effect of the preceding surrender by *T.* to the use of his will, in regard to its enabling him to devise the remainder in fee limited to him by the subsequent surrender made upon his marriage; and depended on the question, whether that
limi-

limitation to his right heirs was a new estate, or part of his old estate unaffected by that surrender? Had it been a new estate, it seems it could not have passed by his will, for want of being surrendered to the use of his will; but as it was held to be part of the old estate, which was in him when he made the surrender to the use of his will, he was enabled to devise it by virtue of that surrender. As to there having been no admittance in his lifetime under the last surrender, that circumstance seems to have made no alteration at all in the case, because the admittance of his widow after his decease was an admittance to all in remainder under the same surrender, according to the well known doctrine in such cases; and consequently they could have come in by relation under that surrender, as if the admittance had immediately followed the surrender; and accordingly it was observed by *J. Blackstone*, that the case would have been all one, even if upon the last surrender made by *T.* he had been admitted under it.

I thought it incumbent on me to present the reader with this late decision, in order to prevent his falling into an error in regard to the law upon this point, from too much attention to what seems to have been the old opinion, that all the estates derived under the uses of a surrender of copyholds were new estates

estates throughout, as being created by, and held under a new copy or grant.

Here, however, we are to observe, that if there be a limitation to a man's heirs in any deed, and afterwards he, by other means, becomes seised of the freehold, in this case the two estates will not become united in him, but the limitation to his heirs will still continue what it originally was, a contingent remainder; as where *A.* was tenant for life of *B.* remainder to the right heirs of *B.*, *A.* afterwards granted his estate to *B.* so that he became tenant for his own life, remainder to his right heirs; yet this remainder continued a contingent remainder.

2 Leon. 7.
Ld. Raym.
37. Case cited
in Moor v.
Parker.

And so if there be tenant for life, and afterwards the reversion by some other conveyance be limited to his heirs, &c. it has been held, that such limitation will not be executed in him. There was, indeed, a case in Chancery, where *A.* upon the marriage of *B.* his son with *C.* settled lands upon *B.* for life, remainder to *C.* his wife for life, remainder to the heirs of their two bodies, remainder to *B.* in fee. *B.* and his wife by deed and fine mortgaged in fee, and subject to the mortgage the lands were settled to *B.* for life, and after *B.* and *C.*'s death, to the heirs of the body of *C.* by *B.* remainder to the right

Skin. 599.
4 Mod. 319.
Ld. Raym.
37. Moor v.
Parker.

2 Vern. 486.
Clifton v.
Jackson.

right heirs of *B.* After *B.*'s death, *C.* suffered a common recovery; one question was, if the estate to *C.* for life by the first settlement; and the limitation to the heirs of her body by the second, did consolidate? Lord Keeper *Wright* doubted whether they did not consolidate: and said, the authorities were only in the affirmative, that if by the same deed they should consolidate; not negatively, that if by different deeds they should not; and cited the case of *Pybus* and *Mitford*, where no express estate for life was limited, but arose by implication; and there it was held, that the estates were consolidated. However, the court took time to consider. And, indeed, Lord Keeper *Wright*, when he said the authorities were only in the affirmative, &c. appears not to have been apprized of the case, 29 *Ed. 3.* cited by *Holt* in the case of *Moor* and *Parker*, (nor indeed of *Holt*'s own opinion in the case of *Moor* and *Parker*) which are direct authorities, that when the freehold in the ancestor, and the limitation to the heirs, &c. are by different conveyances, they will not consolidate. And as to the case of *Pybus* and *Mitford*, though the freehold there arose by implication, yet that implication was the effect of the same deed which contained the limitation to the heirs of the body, and consequently both estates were in that case created by, and arose from the same

same deed ; so that it seems Lord Keeper *Wright* had not sufficiently weighed the ground on which his doubt was conceived, and therefore took further time to consider of it : what was the result of his further consideration we are not (to my knowledge) informed.

The general rule above laid down, respecting a subsequent limitation to the heirs, &c. after an estate of freehold given to the ancestor in the same conveyance, holds in the case of a will as well as of a conveyance at common law, wherever the limitation in question gives a legal and not a trust-estate. This I shall endeavour to prove in the next following pages.

The rule is supposed to have been originally introduced to prevent frauds upon the tenure : if such a limitation had been construed a contingent remainder, the ancestor might, in many cases, have destroyed it for his own benefit, if occasion had called for it ; if not, he might have let it remain to his heirs in as beneficial a manner as if it had descended to him, at the same time that the lord would have been deprived of those fruits of the tenure which would have accrued to him upon a descent. So that under such a construction, the ancestor would have had all the power over the estate which he would have had over a vested

vested inheritance ; and if he were not inclined to use that power, his heir would have taken the estate as fully as by descent, without the feudal burdens to which he would have been liable, in consequence of a descent. So advantageous a construction would doubtless have made limitations of that nature very frequent, to the great prejudice of the lord of whom the lands were holden.

In those cases, indeed, where the limitation to the heirs, &c. was not immediate upon the limitation of the freehold to the ancestor, or where the ancestor himself would not be intitled to the inheritance upon the destruction of the remainder of his heirs, &c. there it could not be to the ancestor's interest, to destroy the remainder to his heirs, though it had been construed contingent, but nevertheless, the heirs would have escaped the same duties to the lord, and the lord of course have been the same loser in these as in the other cases. Therefore, though there could be no ground to apprehend the great frequency of limitations of the latter sort, because of the limited interest the ancestor could have in them ; yet, as they would have proved equally prejudicial to the lord whenever they should occur, as those other wherein the ancestor had a greater interest, the same reasons prevailed to extend the rule to all of them.

Upon

Upon these grounds, it seems, that the general rule I have been treating of is found to extend to the cases I have enumerated. The mischief to be obviated was the same, whether the limitation was created by deed or devise; it naturally follows, that the same rule should take place in both cases. The reason upon which this rule of law first took its rise, ceased, it is true, with those fruits of tenure which it was calculated to preserve; so has the reason upon which the right of *primogeniture* was first established in this kingdom, long since ceased; nay, the original reason of most of our laws of property (to say nothing of our other laws) existed no longer than the old feudal tenures prevailed; yet, I presume, the right of *primogeniture* is still considered as part of the laws of descent of lands in this kingdom. Nor can any authority prevail upon me to believe that the *stat. 12 Charles 2. c. 24.* virtually annihilated almost the whole body of our *English* laws, only by converting other tenures into common socage tenures. We have many laws, the origin of which cannot at this distant period be traced at all; yet, justly should we laugh at the man who should urge that as an argument against the present validity of such law: and surely a law for which no reason at all now appears, has no more original ground in the present state of things, than a law,

law, whose origin may be traced up to a circumstance which does not now exist; what reason then can be assigned why the one should be less sacred than the other ?

It is true, where those things which are the objects of a law cease to exist, there the law itself must of necessity cease for want of subject-matter to relate to or have any effect upon ; but it by no means follows, that where the same objects of a law still continue, that there the law should cease, only because the very state of things which was the first occasion of that law no longer exists.

The constant necessity for laws of some sort or other must be admitted, and it is evident that some accident, circumstance, or state of things, must be the first motive to every law : now although, after the establishment of a law, that very accident, circumstance, or state of things, which first introduced such law, may happen to cease, yet, whilst the same subject of that law continues, there must be still the same necessity for some law or other with respect to that subject ; but if the old law is to cease with the circumstance or state of things which gave it birth, it follows, that the subject of such expired law must remain at large, unregulated by any law, and subject only to the arbitrary direction of ignorance, partiality,

partiality, or caprice, until legislature shall interfere and make a new law; this would be opening a door perpetually to all that uncertainty, confusion, and inconvenience, which laws were intended to obviate and prevent.— I therefore conceive myself justified in concluding, that every law once established continues to be a law whilst the subject of it exists, until altered by some solemn act of legislation.

Now, with respect to the rule of law, whereby the limitation to the heirs, &c. is executed in the ancestor, though we admit the reason upon which it first took place no longer to exist, yet the subject of the law still remains, there are still the same limitations of estates for the rule to operate upon, and the law having been once so established, (no matter upon what ground) the courts of law, who considered themselves as entrusted with the power, not of abrogating, altering or enacting, but only of expounding and pronouncing *established* laws, have, through a long succession of determinations on this point, grounded their judgments entirely upon that rule, as will appear, when I come to consider the several cases respecting it.

The court of Chancery indeed does not consider itself tied up to an implicit observance of the same rule, in respect to those limitations

tations which are the immediate objects of that court's jurisdiction ; I mean, limitations which do not immediately vest the legal estate. In the decreeing the execution of marriage-articles, and in the construction of trust-estates, that court regards the end and consideration of the settlement, and the intent of the trusts, rather than the legal operation of the words in which the articles or the trusts are expressed.

Thus, in the case of articles before marriage for making a settlement, if there be a limitation to one of the parties for life, with a remainder to the heirs of the body of the same party, the latter words are considered as words of purchase, and not of limitation, and the future settlement or conveyance in pursuance of such articles, will be decreed to be made agreeable to such construction.

1. Abr.
Trevor
Trevor.

As where *A.* in consideration of an intended marriage, entered into articles, by which he covenanted with trustees to settle an estate to the use of himself for life, without impeachment of waste, remainder to his intended wife for life, remainder to the use of the heirs-male of his body upon the body of his intended wife to be begotten, and the heirs-males of such heirs-males issuing, remainder to the right heirs of the said *A.* for ever ; and covenanted, that in case the said limitations were not thereafter well

well raised according to the intent of the said articles, that he and his heirs would stand seised of the premises until a further assurance thereof should be made to such uses, intents and purposes, as in the articles were before expressed and declared. The marriage took effect, and *A.* had issue four sons and two daughters. The articles were laid by unnoticed for several years, and *A.* levied a fine of the lands (supposing himself to be tenant in tail under the articles); and afterwards, both the trustees being dead without requesting a settlement, *A.*'s eldest son having married against his father's consent, and by several other acts of weakness and disobedience much offended him, *A.* by deed reciting the said articles, and the weakness and disobedience of his eldest son, declared, that the said fine, so levied by him, should enure to the use of himself for life, without impeachment of waste, remainder to his wife for life, remainder to his second son in tail male, with like remainders to his two younger sons, with remainder to his own right heirs; and after making a like settlement of other lands, *A.* died intestate, leaving a great personal estate, and leaving a real estate in *Ireland*, and new-purchased lands in *England*, together of the value of 1000*l.* *per annum* and upwards. Upon his death, the estate in *Ireland* and the new-purchased lands descended

descended to his eldest son, who also became intitled to his share (upwards of 9000*l.*) of the personal estate. The second son entered upon the settled estates, and the eldest son having got possession of the articles, which it appeared had been thrown by several years as useless, brought his bill for a specific performance thereof.

It was insisted for the defendant, that though by the first part of the articles they seemed to be executory, yet by the covenant to stand seised in the last part of them, they were actually and immediately executed; that he thereby covenanted to stand seised to the before-mentioned uses, till a settlement was made accordingly; that no settlement having been made, the uses continued to be executed by virtue of that covenant; and by these uses he was plainly tenant in tail, and by the fine had bound his issue, and made himself master of the estate, and might dispose of it as he thought fit. But Lord Chancellor said, that upon articles the case was stronger than on a will: that articles were only minutes or heads of the agreement of the parties, and ought to be so modelled when they come to be carried into execution as to make them effectual; that the intention was to give *A.* only an estate for life; that if it had been otherwise, the settlement would have been
vain

vain and ineffectual, and it would have been in *A*'s power, as soon as the articles were made, to have destroyed them; that the covenant to stand seised was, until such time as the said uses were well raised, according to the true intent and meaning of the articles; that if a settlement had been made defective in any particular, it would not have been final or conclusive; that a second settlement must have been made till the uses were well and truly raised, and that this covenant for ever subsisted till such settlement should be made; that he hoped never to see the time when the court would so far have power as to judge what behaviour of a son should amount to a forfeiture of his estate; and therefore thought, if a settlement had been made, no misbehaviour of the son could amount to a forfeiture of it; that this estate being specifically agreed to be settled, it was a trust for the eldest son, which passed with the lands into whose hands soever they came, and could not be defeated by any act of the father or the trustees; and therefore he decreed a conveyance to the plaintiff, and the heirs male of his body, and an account of the profits from his father's death, and the deeds and writings to be delivered up. This decree was afterwards affirmed in the House of Lords.

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So

1 Eq. Abr.
392.
Jones v.
Laughton.

And vide
1 Eq. Abr.
393. c. 5.
and Gilb. Eq.
Rep. 114.
Nandick v.
Wilkes.

So where articles were entered into, whereby it was agreed that the wife's portion should be laid out in the purchasing of lands, which should be settled on the husband and wife for their lives, and the life of the survivor, and after to the *heirs of the body of the wife* by the husband to be begotten; yet the settlement was decreed to be made to the *first and other sons successively in tail*, so that the husband and wife might not have power to bar the issue.

The above cited cases are instances wherein there were articles only and no settlement, and the court was applied to to carry the articles into execution. But there are also instances where there were both articles and a settlement in pursuance thereof made previous to marriage, and the settlement, by pursuing the very terms of the articles themselves, in regard to the limitation to the ancestor for life, with a subsequent limitation to the heirs of his body, &c. has given him an estate-tail; in which cases the court, upon an application for that purpose, has interfered to rectify such settlement, by making the husband only tenant for life, with contingent remainders to the issue, &c. in strict settlement.

2 P. W. 349.
West v. Errissey.

As where articles were entered into for settling lands to the use of *B.* the husband for life,

life, without waste, remainder to *M.* the wife for life, remainder to *the heirs-male of the body of B. by M.* remainder to the heirs of the body of *B.* by any other wife, remainder to *the heirs-female of the body of B. by the said M.* with leasing and jointuring powers to *B.* Afterwards, and before the marriage, a settlement was made, and mentioned to be *in pursuance and performance* of the articles, and the lands were thereby limited to *B.* for life without waste, remainder to the first, &c. son and sons of the marriage successively in tail-male, remainder to the first, &c. son and sons of *B.* by any other wife in tail-male successively, remainder to *the heirs of the body of the said B. by the said M.* remainder over. They had issue only one daughter, who died, leaving two daughters. *B.* having an estate-tail under the limitation to *the heirs of the body, &c.* suffered a recovery, sold part of the lands, devised the residue, and died. The granddaughters brought their bill in the Exchequer against the executors of *B.* to rectify the mistake in the settlement, in limiting an estate-tail to *B.* instead of limiting it in strict settlement, as by the articles it ought to have been. The articles were made in *December*, the settlement in *March* 1685; the sale of the lands in 1698, and the will in 1722: the defendant pleaded the settlement, the recovery, the will, and the long enjoyment; but the

plea was over-ruled by Lord Ch. B. *Gilbert* and the other Barons; and after hearing the cause, Lord Ch. B. *Pengelly* and the other Barons dismissed the bill without costs, it appearing to them dangerous to set aside a settlement which seemed to have been solemnly and deliberately made. But on an appeal to the Lords, this dismissal was reversed, and the lands *not sold* were decreed to be conveyed to *the grand-daughters and the heirs-female* of their bodies, as tenants in common, with cross remainders to them in tail-female; and the devisee to account for the profits, and the executor to account for the purchase-money received by *B.* for the lands by him sold, and to pay interest for the same; the writings to be brought into the court of exchequer, and possession to be delivered to the appellants; and the principal monies arising by the said sale to be laid out in lands to be settled to the same uses as the lands unsold were decreed to be conveyed to.

The principal grounds of this appeal were, That the express estate for life, without waste, with power of leasing given to *B.* in the articles, was plain evidence that a strict settlement was intended, and that he should have no power to bar his sons or daughters—That the settlement took notice of the articles, and was expressly said to be made *in pursuance* and

Vide Honor
v. Honor,
1 P. W. 123,
and 2 Vern.
658.

and performance thereof; which demonstrated that the parties did not design to depart from the articles, nor had come to any new agreement for that purpose.—That there seemed to be as much reason, that the expression of *heirs-female* of the body, contradistinguished from sons, should, in marriage-articles, have the same construction in favour of daughters, as the expression of *heirs-male* had in favour of sons, both being equally under the contemplation of the parties; and especially, since in this case *there was no other provision* for daughters besides the limitation intended them by the articles, and according to the common course, where a provision is made for daughters by a term of years, it is always so limited as to be out of the father's power to bar it.

In a subsequent case, indeed, where marriage-articles were entered into for settling lands to the use of the husband *D.* for life without waste, remainder to trustees and their heirs during his life, to support contingent remainders, remainder in part to the wife *E.* for her jointure, remainder as to the whole to first, &c. son and sons of the marriage in tail-male successively, remainder to the *heirs male of the body of the husband*, (*i. e.* by any wife) remainder to the *heirs male of his body by his said wife E.* remainder to his own right heirs, with a clause empowering husband and wife

Powell v.
Price, 2 P. W.
535.

to make leases, and also a clause that if he should die without issue-male by his said wife, if there should be one daughter, she should have 3000*l.* and if there were more daughters than one, they should have 4000*l.* among them; which portions were to be secured on some part of the estate. It happened there was issue of the marriage only one daughter. *D.* survived his wife, and suffered a common recovery of the lands, and made another settlement of them in consideration of, and previous to, his second marriage, subject as to part to a trust for raising 3000*l.* for his daughter by his first wife, in satisfaction of the portion she was entitled to under the first articles, and maintenance for her in the mean time.

The question was, (here being notice of the first articles) whether the limitation in the first articles *to the heirs of the body of D. by E. his wife*, should not be taken as if it had been to the daughters of *D.* by his first wife? for then they could not be barred by the recovery.

It was insisted, that here the limitation to the heirs of the body of *D.* by *E.* his first wife must be the same as if it had been to the daughters; for it could not be intended in favour of the sons of that marriage, there being

ing an exprefs limitation before to them ; and though in the cafe of a fettlement there being a precedent eftate for life to *D.* it would have been an eftate-tail in him barable by the common recovery, yet it was otherwise where it refted upon articles ; and the cafe of *West v. Errifley* was cited. Supra, p. 66.

On the other fide it was faid, and refolved, that the 3000*l.* fecured by the fettlement on the fecond marriage, was an actual fatisfaction of all demands under the articles ; and that tho' a limitation by articles to the heirs-male of the marriage, after an exprefs eftate for life to the father, fhould be taken to mean a remainder to the firft, &c. fon, it does not follow that a limitation to the heirs of the body muft be equivalent to a remainder limited to daughters ; efpecially in this cafe, where they were postponed to the limitation to the heirs-male of the body of *D.* by any wife, and where there was an *exprefs pecuniary provision* made for the daughters by the firft wife, which was all they were to depend upon.

And the following diverfities were taken by the court, between this laft cafe and the cafe of *West* and *Errifley* ; in the cafe of *West* and *Errifley*, no portions were provided for the daughters of the firft marriage ; in the
laft

last case, portions in all events were secured to such daughters. In the case of *West v. Errissey*, after the limitation in the articles to the *heirs-male* of the body of the husband and wife, and the remainder to the *heirs-male* of the body of the husband by any wife, came the remainder to the *heirs-female* of the body of the husband by the first wife, &c. so that the daughters were more immediately in the view and contemplation of the parties than in the last case.

Burton v.
Hastings.
Gillb. Eq.
Rep. 113.
Abr. Eq. 393.

It is true, there was a case in Chancery before Lord Cowper, about eleven years prior to the case of *West* and *Errissey*, where marriage-articles were entered into for settling the wife's estate on *the husband and wife, and on the heirs of their two bodies to be begotten*. After the marriage, a settlement was made of the lands upon the husband and wife for their lives, remainder to the heirs of the body of the wife by her said husband. There was issue of the marriage one daughter only. After the death of the husband, his widow married again, joined in a fine of the lands, and settled them to other uses. A bill was brought by the daughter of the first marriage, to carry the articles into execution; for that no care was taken of the daughter by the settlement, as the limitation to the heirs of the body of the

the wife by her first husband made her tenant in tail, and consequently left her the power to bar them, which was contrary to the intent of the articles, which was to make an effectual provision for all the issue of that marriage. But Lord Cowper dismissed the bill; saying, if no settlement had been made, and application had been made to the court for making one pursuant to the articles, the court would have taken care to have secured to the daughters the provision intended them by the articles. But a settlement having been actually made and accepted by the parties, he could make no alteration in it.

But the authority of this case of *Burton and Hastings* appears to be entirely removed by the above cited subsequent decision by the Lords, in the case of *West and Errissey*; and it is observable, that in *Gilbert's* report of the case of *Burton and Hastings*, after stating that Mr. *Vernon* offered to the court a difference, where the settlement (made in pursuance of articles) was before marriage, and after, viz. that where it was before, the court would not interpose, as it could where it was after marriage; it is said, that the court had no regard to this distinction, but too hastily dismissed the bill.

And

Cas. temp.
Talbot. 20.
Legg v.
Goldwire.

And, afterwards, indeed, in the case of *Legg* and *Goldwire*, (about twelve years later than the case of *West* and *Errissey*) Lord *Talbot* adopted the distinction offered by Mr. *Vernon* in the case of *Burton* and *Hastings*; and laid it down as a rule, that where articles are entered into before marriage, and a settlement made after marriage different from those articles, (as if by articles the estate was to be in strict settlement, and by the settlement the husband is made tenant in tail) the court will set up the articles against the settlement. But where both articles and settlement are previous to the marriage, at a time when all parties are at liberty, the settlement differing from the articles will be taken as a new agreement between them, and shall controul the articles. And although in the case of *West* and *Errissey* the articles were made to controul the settlement made before marriage, yet that resolution does not contradict the general rule; for in that case the settlement was expressly mentioned to be made in pursuance and performance of the said marriage-articles, whereby the intent appeared to be still the same as it was at the making of the articles.

Upon the whole, therefore, the doctrine as to this matter appears now to be established, that
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in the case of articles before marriage to settle an estate for life on either of the parties, remainder to the heirs of the body of the same party, if a settlement be made after marriage limiting the estate in that manner, Chancery will rectify it, and make it a strict settlement. But that court will not interfere, if both articles and settlement are made before marriage, unless the settlement in that case be expressed to be made in *pursuance of the articles*; for the court will suppose that the parties had altered their intention with respect to the terms of the marriage, which they may do before the marriage, though not afterwards; and that the settlement was made in pursuance of such new agreement, and not of the articles; but when it is said to be made *in pursuance of the articles*, no room at all is left for such a supposition.

But, however, here we must remark, that the court will not in these cases relieve against purchasers for valuable consideration and without notice. As in the case of *West and Errisley* above cited, one of the objections to the appeal was, that if the articles should be allowed to controul the settlement, the purchasers under the husband would in consequence be affected; to which it was answered, that the appellant's bill was not brought against

Supra, p. 66.

Supra, p. 69.

against any purchaser as to the parts of the estate sold by the husband; since the appellants only prayed satisfaction out of his personal estate. And, indeed, the decree was according to such prayer, and did not in the least affect any of the purchasers.—So in the case of *Powell and Price* above cited; it was admitted, that if the trustees (under the settlement) or second wife had no notice of the article made on the first marriage; then their being purchasers without notice would have been a bar to the plaintiff's claim by the articles.

Warwick v.
Warwick
and Kniveton,
3 Atk. 291.

And in the case of *Warwick v. Warwick*, before Lord *Hardwicke*, where articles were entered into for settling an estate to the husband for life, after his death to the intended wife for her life, and after her death to the use of *the heirs-male of the husband to be begotten on the body of the wife*; afterwards, and before marriage, by a settlement declared to be in *part performance of the said articles*, the lands were settled upon the husband for life, then to wife for life, and after her death to the use of the heirs-male of the husband begotten on the body of the wife. Afterwards the marriage took effect, and the husband suffered a common recovery, and mortgaged the land in fee, which mortgage was afterwards assigned to another mortgagee.

gagee. After the father's death, *P.* his eldest son brought his bill for an account of the rents and profits, and for possession, and to have the full benefit of the marriage-articles; insisting that his father was intended to be tenant for life only, with remainder to his first and other son and sons successively in tail; that he was a purchaser under those articles, and they ought to be considered as if they had been strictly carried into execution. Lord *Hardwicke* said it was certainly true, from the general principles of the court, that if articles on marriage are to settle an estate to *A.* for life, remainder to his wife for life, remainder to the heirs-male of the body of *A.* it is taken in that court to be in strict settlement, and an estate for life only in the father and mother; and if the settlement be made after marriage, it shall be rectified by the articles before—that the case of *West* and *Errissey* was both upon articles and a settlement before marriage; and was the first case where the court altered a settlement and made it conformable to articles, and relieved on the head of mistake, *the settlement referring expressly to the articles.* But that was between the parties to the articles and settlement, and their representatives, and *mere volunteers*, and had not been carried into execution against a purchaser—that it was true, the court had given relief

lief against persons who claimed under the settlement and their representatives; but no case had gone so far as to relieve against purchasers.—He also observed, that there was no case but where there are *articles* as well as a settlement, in which the court will construe words which make a legal estate-tail to be carried into strict settlement. And upon the whole Lord *Hardwicke*, after delivering his opinion that there was not sufficient proof of notice of the articles in the assignee of the mortgagee, dismissed the bill so far as it prayed to be relieved against the mortgage; but decreed that the plaintiff might be at liberty to redeem.

It is obvious from the foregoing cases, that the general principles upon which the court of Chancery interposes, to carry marriage-articles into execution by way of strict settlement, notwithstanding the articles themselves are not penned in that manner, is, that articles made in consideration of, and previous to marriage, are considered as heads of agreement entered into between the parties upon valuable consideration; that a provision for the issue of the marriage is one of the great and immediate objects of this agreement, and consequently a principal intention of such agreement must be, to secure such a settlement as shall contain an effectual provision

vision for that issue; which end, it is clear, cannot be answered by a settlement so framed as to leave it in the power of the parents to bar their issue by fine or recovery.

The issue in these cases are considered as claiming a provision in the capacity of purchasers for valuable consideration, under the purport and intention of the stipulated terms upon which that marriage was engaged in which gave them birth. But it is evident the same obligatory considerations do not extend to wills; devisees, as such, are meer volunteers; their claim has no other ground than the intention and bounty of the testator, and consequently the terms in which that intention and bounty is expressed, must alone ascertain the nature and extent of their right. They have no claim arising from compact made upon valuable consideration, as the issue in the foregoing cases confessedly has. Therefore it is no wonder that we find frequent distinctions between wills and marriage-articles, in regard to the effect of the limitation to the *heirs of the body*, &c. after a preceding limitation to the ancestor.

Thus, where *A.* by will gave 300*l.* to her daughter, to be laid out in land and settled to the use of her said daughter and her children,

2 Vern. 536.
Sweetapple v.
Bindon.

dren, and if she died without issue, remainder over. The daughter married, and after her decease, a bill was brought by her husband to have the money laid out in land, and the land settled on him for life, as tenant by the curtesy, or to have the interest of the money for life in lieu of the profits of the land. The court held, that if it had been an immediate devise of the land, the daughter would have been, by the words of the will, tenant in tail; and consequently the husband would have been tenant by the curtesy; and that in case of a *voluntary devise, the court must take it as they found it*, and not lessen the estate or benefit of the legatee; although upon *the like words in marriage-articles it might be otherwise*, where it appeared the estate was intended to be preserved for the benefit of the issue; and therefore decreed the money to be considered as lands, and the husband to have the interest for his life, as tenant by the curtesy.

Legat v.
Sewell.
1 Eq. Abr.
395.

So in another case where there was a devise to *A.* for life, and after his decease to the *heirs male of his body*, and the heirs-male of the body of every such heir-male, severally and successively as they should be in priority of birth and seniority of age, remainder to *B.* In arguing the question, whether *A.* was tenant for life only or in tail; the common case of marriage-articles was cited, where, though they

they were so worded as to give the husband an estate-tail, yet the court had decreed a settlement on the husband for life only, and then upon the first and other son and sons, &c. Upon which part of the argument Lord Keeper observed; that where *settlements were agreed to be made upon valuable considerations*, the court would aid in artificial words, and make an artificial settlement; but he never knew it done *for a bare volunteer*.

And again, in a case where lands were limited by will *in trust* for *B.* for life, with leasing power, and after his decease *in trust* for the heirs-male of his body. Lord Keeper decreed an estate-tail to be conveyed to *B.* although he admitted that upon articles of marriage, founded on agreement, the husband in such case might be made only tenant for life; but in a will, (he said) *you must take words as you find them*. So in the case of *Trevor* and *Trevor* above cited, Lord Chancellor said, that upon articles the case was stronger than on a will.

Baile v.
Coleman,
2 Vern. 670.
1 P. W. 142.

I have adduced the above instances in order to shew, that the practice of the court of Chancery, in respect to the construction of marriage-articles, is not, even in that court, admitted to be any sort of authority for the like construction in the case of wills; unless in cer-

Cas. temp.
Talbot. 20.

2 Atk. 583.
in the case of
Bagshaw v.
Spencer.

tain cases where a will does not give the *legal* estate, but only creates a *trust* to be carried into execution. For indeed Lord *Talbot*, in the case of Lord *Glenorchy* and *Boswell*, said, the rule is not generally true, that in articles and *executory trusts*, different constructions are to be admitted; that the case of *Papillon* and *Voice* (hereafter cited) was directly against that, and seemed to him a very strong authority for executing the intent in one case as well as in the other; and Lord *Hardwicke* carried the same opinion still further in the case of *Bagshaw* and *Spencer*, by exploding the distinction between trusts executed and *executory*, and considering all trusts as *executory*. This brings us to those cases of limitations in *trust*, in decreeing the execution of which, the court of *Chancery* so far departs from that which would be the legal operation of the words limiting the trust, if reduced to a common law conveyance, as to construe the words *heirs of the body* of *cestui que trust*, although preceded by a limitation for life, as words of purchase and not of limitation.

These cases are such, wherein it appears by some clause or other, which is essentially repugnant to the nature of an estate-tail, that the maker of the deed or will could intend only an estate for life.

As

As where *A.* devised a sum of money to trustees in trust, to be laid out in lands, and to be settled on *B.* for life, without impeachment of waste, remainder to trustees and their heirs during the life of *B.* to support contingent remainders, remainder to the heirs of the body of *B.* remainders over, with a power to *B.* to make a jointure. It was decreed that *B.* should have but an estate for life in the lands so to be purchased; and Lord Chancellor *King* declared the court had a power over the money directed to be invested in land: that the diversity was between the will's passing a *legal* estate and leaving the estate *executory*, so that the party must come into the court of *Chancery*, in order to have the benefit of the will; that in the latter case, the intention should take place, and not the strict rules of law. And in the case of Lord *Glenorchy* and *Bosville*, Lord *Talbot* afterwards adopted the very same distinction, between an *immediate devise*, and an *executory trust* where you must apply to the court for carrying it into execution. In the case of Lord *Glenorchy* and *Bosville*, the question arose upon a trust limitation to the *issue of the body*, after an estate for life to the ancestor: which being materially different from a limitation to the *heirs of the body*, I omit the state of that case here, as not so immediately applicable to the present purpose.

2 P. W. 471.
Papillon v.
Voice.

Lord Glenorchy v. Bosville, Cas. temp. Talb. 3.

1 Vezey 142.

2 Atk. 245.

570. 577.

Bagshaw v.

Spencer.

So in the case of *Bagshaw* and *Spencer*, where *A.* devised lands to five trustees, their heirs and assigns *in trust*, by rents and profits, *sale or mortgage*, to pay his debts, &c. and *after payment thereof*, he devised the same estates to three of the same trustees, their executors, &c. for 500 years, upon trust to pay his legacies, and an annuity of 200*l.* *per ann.* to his sister for life, and after the determination of the said estate for years, he devised the same premises to all the said trustees and their heirs in trust, as to a moiety, to the use of *T.* his nephew for life, without impeachment of waste, and after the determination of that estate, to the trustees and their heirs during the life of *T.* to support contingent remainders, and after his decease to the use of the heirs of the body of *T.* lawfully begotten, and for want of such issue, then to the use of his nephew *B.* for the term of his *natural life*, without impeachment of waste, and after the determination of that estate, *to the same trustees during the life of B. to preserve contingent remainders*, and after his decease, then to the use of *the heirs of the body of B.* lawfully begotten, with like remainders to other nephews.

The first devisee *T.* died without issue, upon whose decease *B.* the next in remainder, filed his bill against the trustees and all proper parties;

ties; praying, amongst other things, to be let into possession of a moiety of the estates; afterwards *B.* dying pending the suit, his widow and devisee brought a bill of revivor and supplemental bill, charging that *B.* in his lifetime, by bargain and sale inrolled, conveyed this moiety of the estates to two persons and their heirs, to make them tenants of the freehold, and suffered a recovery thereof (in which he was vouched) to the use of himself in fee, and afterwards devised his said moiety to his said widow in fee, and died without issue. The general question between the parties was, whether an estate-tail or an estate for life only, passed by the will of *A.* to *B.*

It was insisted for the plaintiff, that it was an estate tail, upon the general rule, that where lands are limited to a man for life, with a limitation in the same deed or gift to the heirs of his body, that this makes an estate-tail, and that a devise of lands in the same way passed the same estate; that the limitation was either a legal estate, or a trust vested or executed and not executory. On the other hand it was contended, that those rules were artificial, not founded in justice, but for support of the feudal tenures, and therefore the judges ought to shew themselves *astuti* in supporting exceptions to such rules. The Master of the Rolls however held

held it to be a trust, and not a legal estate, but decreed that *B.* was entitled to an *estate-tail* in the moiety so devised to him.

Upon an appeal to Lord *Hardwicke* from this decree, he agreed that this devise was only a trust in equity; the devise being to *trustees and their heirs*, which carried the whole fee in point of law, and the devise to sell being sufficient to carry the fee, if the word *heirs* had been omitted; and therefore the whole fee being in the trustees, no legal remainder could be limited to *B.* and as to its being considered as an executory devise to *B.* (which it seems, had been contended at the bar) it was too remote to be good in that view, being after all debts indefinitely paid, which, in point of time, might exceed a life or lives in being, or any other time allowed by law; and besides, in that case the recovery by *B.* being before the debts were paid, and consequently whilst the legal fee remained in the trustees, *B.* could make no good tenant to the præcipe; and that would prevent its passing by *B.*'s will: for whatever made that recovery void, equally defeated the plaintiff's title, which made it necessary for the plaintiffs to admit that all the devises subsequent to that to the trustees were trusts in equity.

That

That the main question, whether it was an equitable estate tail or for life only, depended on the construction of the words *heirs of the body*, whether they should be taken as words of limitation or of purchase.—That the intent was clear that they should be taken as words of purchase, from the clause *without impeachment of waste*, and the limitation to trustees *to support contingent remainders*. That there were several cases even at law, where they had been taken as words of purchase, as *Archer's case*; that the words of limitation added there, and in all such cases, were only demonstration of the intent of the testator in using the first words. That the case of *Colson and Colson*, which was objected as an authority, that the interposition of trustees to support contingent remainders is not sufficient to turn the subsequent limitation to the heirs of the body into words of purchase, differed from the principal case; here being (in the principal case) a clause without impeachment of waste; altho' that might be thought of little weight; but the great difference was, that **THIS** is a devise of a trust in equity, **THAT** of a mere legal estate, the words of which must be taken as they stood, according to the strict legal determination. That here all the limitations were the direction of a trust, which the court was bound to carry into

Vide Colson
and Colson.
infra.

into execution according to the intent of the testator.

That as to the difference between trusts *executed* and *executory*, the distinction had never been established by any direct resolution. That all trusts in notion of law are executory, and to be carried into execution by the court by subpœna. That if *B.* had himself come to have a conveyance decreed him, the question would have been, whether the court should have inserted trustees to support contingent remainders, if they had not, they would have departed from the words of the will; if they had, the remainder must have been to first, &c. son and sons in strict settlement, for otherwise there would have been no remainders to be preserved; and therefore, if the court must at all events depart from the words of the will, such departure must rather be to support than to frustrate the plain intent of the testator; for these reasons Lord *Hardwicke* reversed so much of the decree at the Rolls as gave *B.* an estate tail under the will.

It is obvious, this decree of Lord *Hardwicke* was grounded on the distinction between a *trust* in equity and a mere *legal estate*; he holding that in the *latter* the words *must be taken as they stood, according to their strict legal determination.*

From

From the example of the court of Chancery in the above cases of *trust* limitations, some people, with more plausibility than reason, have endeavoured to infer that the courts of law should indulge the same latitude of construction; assuming it as a principle, that there is no sound distinction between the devise of a legal estate and a trust. But this is *petitio principii*; for I believe there is not a point in which our books more clearly and accurately agree than the distinction between a *legal* devise and a *trust*; which appears as well from the cases I have already mentioned, as from those which I shall mention by and by. In the mean time, as to the soundness and reason of the distinction, we are to consider, that *trusts* were the mere creatures of confidence between party and part, and totally distinct in almost every quality, from those *legal* estates which were the subjects of tenure. They were in their nature independent of tenure, and therefore not the objects of those laws which were founded in the nature of tenure. They were rights arising solely out of the intent of the party who created them, and therefore such intent could be the only guide in the execution of them. Consequently, when a court of equity, in certain cases of *trust* estates, deviates from the rule above laid down, it does not in so doing depart at all from any rule of law

law by which it was ever bounden: it only exercises that conscience and discretion to which *trust estates* were in their nature originally and necessarily subject.

And yet even the court of Chancery, in order to preserve as near a correspondence as may be between the rules of construction, with regard to trust-estates, and those laws by which legal estates are construed, considers itself as bounden, even in the case of *trust estates*, to decree according to the rule I have been speaking of, wherever it can be done without manifest violation to the intention of the parties.

Baile v. Coleman.

2 Vern. 670.

1 P. W. 142.

As when one devised lands to four persons for payment of his debts, and afterwards to the use of them and their heirs; and afterwards by codicil devised that his will should stand, saving that *A.* (one of the four devisees in the will) should have his share *for life*, with *power to make leases*, remainder to the *heirs-male* of the body of *A.* remainder over. Now this was the devise of a *trust* and *executory*; and Lord Cowper conceived that it differed from an *immediate devise*, and that it was rather to be looked upon in the nature of an *executory devise*, to take effect after debts paid, which were considerable; or in
nature

nature of marriage articles: besides, that the enabling *A.* to make leases, seemed to imply very strongly that he was to have no power to dispose of the inheritance. But the cause coming on before Lord *Harcourt* upon a rehearing, he said the case of a will differed from the several cases of marriage-articles, in the nature of which the issue were particularly considered, and looked upon as purchasers. That in cases of a will, where the parties claim voluntarily, the testator's intent must be presumed to be consistent with the rules of law; that at law those words would certainly create an estate-tail; and it could not be inferred (with any certainty) from the power of leasing, that no estate-tail was intended; such power being more beneficial than that given to tenant in tail by the statute, and as the debts were admitted by the pleadings to be all paid, the same construction was to be made as if there had been originally no trust, and so decreed *A.*'s share to be conveyed to him and the heirs-male of his body, remainder over.

So where there was a devise of lands to a trustee *in trust* to pay the rents and profits to *S.* for her separate use for life, as if she were sole, and after her decease to pay the same to *E.* her son for life, and afterwards to pay the same to the heirs of his body, and for want
of

Garth v.
Baldwin.
2 Vezey, 646.

of such issue, to pay the same to all and every other son or sons of the body of *S.* begotten, &c. Upon the question whether *E.* was intitled to the lands in tail or for life only, Lord *Hardwicke* proceeded on this principle, *viz.* that in limitations of a *trust*, either of a real or personal estate to be determined in that court, the construction ought to be made according to the construction of limitations of a *legal* estate, unless the intent of the testator or author of the trust *plainly* appears to the contrary. He laid it down as a rule (he said) that he was not, in a court of equity, to overrule the legal construction of the limitation, unless the intent of the testator or author of the trust appears by declarations plain, that is by *plain expression* or *necessary implication*. And upon this principle Lord *Hardwicke* decreed a conveyance in tail to *B.* of the real estate so devised.—*N. B.* Upon this case Lord *Hardwicke*, in considering the above case of *Bale* and *Coleman* then cited at the bar, observed, that a tradition prevailed, that Lord *Harcourt's* decree in that case was afterwards affirmed by Lord *Cowper* himself; but he said, that was not the fact, though he believed it was afterwards cited before Lord *Cowper*, and that he spoke to that effect. And Lord *Hardwicke* said, the case of *Bale* and *Coleman* had never been denied

Vide 2 Vezey 657, 8.

nied to be law or a rule of that court, and that he thought it was right to adhere to it.

But to support the argument, that courts of law should give into the same latitude and freedom of construction as the court of Chancery, in respect to the limitation. I am treating of, it has been urged, as a strange kind of inconsistency, that the same limitation should bear different constructions on the different sides of *Westminster-Hall*; that a man should be tenant in tail on one side of the hall, by the very same limitation, which, if he steps across to the other side, will make him only tenant for life. The objection sounds specious enough, but if we look to any thing further than mere words, it loses its whole force.

It is not true that the construction varies with the court; it is the different subject-matter of the limitation which occasions the alteration in the construction of it, and will occasion the same difference of construction even in the very same court. The courts of law and the court of Chancery have hitherto agreed in their construction of the limitation in question, whenever it respected a *legal* estate: the court of Chancery distinguishes between a *legal* estate and a *trust*, and varies its construction accordingly; if the courts of law had been concerned with trusts, it is to be supposed

posed they would have made the same distinction. Where is the inconsistency in allowing different operations to the same limitation, when applied to objects of such different natures and descriptions as a *trust* and *legal estate* clearly are?

It is to be admitted, that the general rules of property respecting *legal* and *trust* estates are the same, but the particular modes of construing the limitations of them may vary. The conformity between the rules of property in *legal* and *trust* estates, respects the allowed measure of the limitations, and not the mere construction of them, as Lord *Hardwicke* observed in the case of *Bagshaw* and *Spencer* before cited. The limitations of trust estates cannot be carried to a greater length, or go further towards a perpetuity, than the limitations of legal estates; but it does not follow that the first may not be expounded more freely, with more regard to the evident intent, and with less adherence to the legal import of technical expressions, than the latter. Nay, a distinction of that sort naturally arises from the different natures of a *trust* and *legal estate* before explained.

When a court of law, in certain instances, construes the limitation of a *legal estate* differently

ently from what the court of Chancery would construe the same limitation, if applied to a *trust-estate*, it does exactly what the court of Chancery itself has used to do in the very same case.

Thus where *A.* devised a sum of money to trustees *in trust*, to be laid out in lands, and to be settled on *B.* for life, without impeachment of waste, remainder to trustees and their heirs during the life of *B.* to support contingent remainders, remainder to the heirs of the body of *B.* remainder over, with power to *B.* to make a jointure; and by the same will devised lands to *B.* *for his life without impeachment of waste*, remainder to trustees, and their heirs during the life of *B.* to support contingent remainders, remainder to the heirs of the body of *B.* remainder over. Tho' it was decreed at the Rolls, that an estate for life only passed to *B.* with remainder to the heirs of his body *by purchase*, as well in the lands devised, as in those directed to be purchased. Yet upon an appeal from this decree, Lord Chancellor *King* declared, as to that part of the case where lands were devised to *B.* for life, though said to be without impeachment of waste, with remainder to trustees to support contingent remainders, remainder to the heirs of the body of *B.* this remainder was within

2 P. W. 471.
Papillon v.
Voice.

within the general rule, and must operate as words of *limitation*, and consequently create a *vested estate-tail* in *B.* and that the breaking into this rule would occasion the utmost uncertainty. But as to the other point, he declared the court had a power over the money directed by the will to be invested in land; and that the *diversity* was where the will passed the *legal estate*, and where it was only *executory* and the party must come to the court in order to have the benefit of the will; that in the latter case, the intention should take place, and not the rules of law; so that as to the lands *to be purchased*, they should be limited to *B.* for life, with power, &c. remainder to trustees during his life to preserve contingent remainders, remainder to his first and every other son in tail-male successively, remainder over.

Here we observe, that in the very same case in the very same court, the same limitation received two different constructions when applied to a *legal* and to a *trust-estate*. Nor is there any thing extraordinary in giving different constructions to the same words in the same will, in regard of their application to objects of a different nature, as may be seen 1 *P. W.* 667. in the case of *Forth and Chapman*. 2 *P. W.* 140. in the case of *Harris* and

and *Bishop of Lincoln*, and 3 *Atk.* 288. in the case of *Sheffield v. Lord Orrery*.

It is observed, indeed, in a note at the end of *P. Williams's* report of the case of *Papillon* and *Voice*, that though the above was Lord Chancellor *King's* opinion, yet the question as to the land devised was given up, the plaintiff having brought a supplemental bill, whereby it appeared that by his father's marriage-article he was intitled to an estate-tail. And Lord *Hardwicke* in the case of *Bagshaw* and *Spencer* says, that the opinion given by Lord Chancellor *King* in the case of *Papillon* and *Voice*, was a sort of extrajudicial opinion; that, taking time to form his decree, he (Lord *C. King*) said, he had looked into the case of *Lisle* and *Grey*, and seemed to be less clear as to the legal estate than before; but as the supplemental bill had brought a new right, he took care to express that the direction to reverse that part of the decree, &c. was expressly founded upon that supplemental bill, which looked as if he wanted to avoid the point.

Vide 2 P. W.
478.

Vide infra,
P. 104.

Vide 2 *Atk.*
581. 1 *Vez.*
149.

Now I must confess, that after the supplemental bill had disclosed a new right paramount to, and which left no room for any right under the will, I don't see how the direction for reversing the decree at the Rolls,

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could

could be expressed otherwise than as founded on such supplemental bill; *i. e.* on the new right thereby disclosed, the other being entirely suspended and removed by it; nor, therefore, am I able to discover how the expressing the decree in that manner (there being no foundation for expressing it in any other) looked like an inclination to avoid the other point, or indeed how it was in his power not to avoid that other point, seeing it was annihilated by the new disclosed right under the settlement. By the report in *P. Williams*, Lord Chancellor King seemed to be clear in his opinion as to that first point whilst it existed, and before the supplemental bill was brought, expressed his intention to reverse the decree; as indeed was observed by the Master of the Rolls in delivering his opinion in the case of *Bagshaw* and *Spencer*; who also observed, that there was another report in the case, where it was said at the end of it, that in the case of *Williams* and *Brown*, Lord King had declared he would reverse the decree. And it seems Lord *Hardwicke* himself, in the case of *Bagshaw* and *Spencer*, said, that since the case of *Coulson* and *Coulson*, he would urge the case of *Papillon* and *Voice* no further than as an authority, that a *trust-estate* by will so penned, ought to receive such construction as he was then speaking of, and the court to direct a conveyance accordingly; in which the court

was

Vide 2 Atk.
576.

Vid. 1 Vez.
149.

was clearly warranted by former cases, as in *Leonard v. Earl of Suffex*, upon which case he only observed, that if the devise had been of a legal estate, with such close not to alien, the sons must have been tenants in tail, and there would be no operation from that clause; and yet upon a *trust* in equity it would turn them into tenants for life. The same distinction appears to have been taken in the same court, in other cases which I shall cite hereafter.

Vide infra,
p. 112.

In fact, therefore, it appears that the force of the argument drawn from the inconsistency of admitting different determinations upon the same limitation in different courts, really makes against that latitude of construction in the courts of law, which it is intended to support. For if the courts of law should construe the limitation of a *legal* estate, in the same manner as a court of Chancery does the limitation of a *trust-estate*, the construction of a court of law, and the court of Chancery, would often differ with respect to the same limitation of a *legal* estate; because the court of Chancery often construes the limitation of a *trust-estate*, differently from the same limitation of a *legal* estate. Then indeed would the inconsistency, now *talked of*, really *exist*, as the same limitation of the very same kind of estate, would bear different constructions in different courts, unless the court of Chancery should be so far

actuated by a spirit of complaisance, as to deviate from its own established rules and distinctions, in conformity to the occasional innovating disposition of another court.

But surely no one will say, that because the court of Chancery is not bounden by a rule, which in its nature and design had no relation to the objects of that court's jurisdiction; therefore a court of law shall cease to be bounden by it, in their decisions in cases of a very different kind, and which were the original, and have ever since continued, the immediate objects of that rule. The authority which can convert a court of law into a court of equity in one instance, and abolish all distinction between *legal* estates and *trusts*, may, (without the *absolute* aid of an act of parliament,) complete the plan of improvement on our ancient laws, and tell us, there is no sound distinction at all between the supposed objects of the jurisdiction of the one court and those of the other: for that a court of law and court of equity in this kingdom differ but in name.

Some instances, there are, even in cases at common law, wherein the subsequent limitation to the *heirs of the body* have been so qualified and corrected by other additional words, as to amount to words of purchase, and not of limitation; but I believe no case can be

as in a trust

be found, before the late case of *Perrin* and *Blake* in the *K. B.* 1769; where a perfect limitation to the *heirs*, or *heirs of the body* (in the plural number), unqualified by any concomitant limitation to *sons*, *daughters*, or *children*, (by reference to which the general force of the word *heirs*, &c. might be restrained) preceded by a limitation of the legal estate for life to the ancestor, in the same deed or will, has been determined not to vest in that ancestor, but in the heir by purchase. Many cases it is true are cited to prove such a determination to have been no uncommon thing. But, with submission, I apprehend it no difficult matter to shew, that no one of the cases so cited comes up to the position it is intended to support.

Upon examining the authorities cited in support of the judgment in the case of *Perrin* and *Blake*, it appears that some of them are cases of *trust* estates, therefore serve only to prove what is not denied; in others, the word *heirs* is not made use of, but the limitation is by words which have not the same established legal import and extent, such as the word *issue* or *sons*, or other words of that less technical force; in others again, there is no limitation of the legal freehold to the ancestor; and I believe there is not one of them in which the words *heirs*, or *heirs of the body* (in the plural number) are used, wherein those words are not restrained or qualified, either by reference or else by additional words.

Thus

Cheek v.
Day, Moor
593. 2 Roll.
Abr. 417.
(G.) pl. 7.
Cro. Eliz.
313. Ow.
148. (cited
Ld. Raym.
205. & Fitz-
Gibb. 24.)

Thus in the case of *Cheek v. Day*, or *Clark v. Day*, *A.* devised lands to her daughter for life, and if she should marry after the death of the testatrix, and have any heirs lawfully begotten, then she willed that her daughter's heir should have the lands after her daughter's death, and the heirs of such heir. It appears by the various reports of this case, that the Judges were much divided in regard to it. But *Moor* says it was adjudged an estate for life only in the daughter, though no judgment is entered upon the roll (as *Fitz-Gibbons* reports.) Now here we observe the limitation was to the heir (lawfully begotten) in the singular number, and words of limitation were grafted thereon; and indeed according to the above state of the case, which is that delivered by *Fitz-Gibbons*, as taken from the roll, there is a limitation in fee grafted on the word heir, which carries this case still further from the point; for the limitation being to the heir lawfully begotten could not give the fee-simple to the ancestor, and an estate-tail in the ancestor could not have answered the superadded words of limitation in fee to the heir.

Archer's case,
1 Rep. 66.

So in *Archer's* case, the limitation was to *A.* for life, and after to the next heir-male of *A.* and to the heirs-male of the body of such next heir-male: here the devise to the heir was a remainder vesting in him by purchase, because the word heir was in the singular

gular number preceded and distinguished by the word *next*, and followed by the words of limitation grafted on it.—The case in *Roll*. cited by Lord *Hale* in the case of *King* and *Melling*, was a limitation to one for life *et non aliter*, and after his death to the *sons* of his body; which was very different from a limitation to the *heirs* of his body; under the devise to *the sons*, the eldest could not exclude the rest, as in a descent in tail, whereas under a devise to the *heirs of the body*, the eldest son must take previous to and in preference of the younger.

1 Roll. Abr.
837.
pl. 13.
1 Ventr. 231.

Again, where *A.* conveyed by fine to the use of himself for life, remainder to the use of his first son and of the heirs-male of his body, with like limitations respectively, to his second, third, fourth, fifth, and sixth sons, *remainder to the right heir of A. to be begotten* after the sixth son, *and of his heirs-male*; it was held the remainder was contingent, because first limited distinctly to particular sons; besides this remainder expressly excluded the first six sons, and therefore it essentially differed from a limitation to the *heirs of the body*, which would have descended to the eldest son first: and it is further observable in this case, that the limitation was not to the *heirs* in the plural, but to the right *heir* in the singular number, with words of limitation superadded, as in *Archer's* case 1 Co. 66.

Palm. 359.
Walker v.
Snow.

So

2 Lev. 223.
Raym. 278.
Lide v. Gray.

So where *A.* covenanted to stand seized to the use of himself for life, and after his decease to the use of *E.* his son for life, and after his decease to the use of the first son of the body of *E.* and the heirs-male of the body of such first son; and for default of such issue, to the use of the second son of the body of *E.* and the heirs-male of the body of such second son, and for default of such issue, to the third son of the body of *E.* and the heirs-male of such third son, and for default of such issue to the use of the fourth son of the body of *E.* and the heirs-male of the body of such fourth son, *and so severally and respectively to every of the heirs-male of the body of the said E. and the heirs-male of the bodies of such heirs-male according to their ages and seniorities*, and for default of such issue, remainder to *W.* &c. and *A.* also covenanted that if it should happen that *E.* should die without issue-male of his body lawfully begotten, that *A.* would then stand seized of the lands to the use, &c. to raise portions for the daughters of the said *E.* &c. — *E.* after the death of *A.* suffered a common recovery of the lands, and afterwards died without issue; and after his decease *W.* the remainder-man brought his ejectment in *B. R.* for the lands. The question was, whether *E.* took an estate-tail, or only an estate for life under the limitation above stated. It was contended for the plaintiff *W.* that the words *and the heirs-male of the bodies of such heirs-male* made the

the heirs male to take by purchase, otherwise those superadded words were useless: that the words and *so severally and respectively to every of* the heirs-male, &c. were words of relation, and signified *so* as the heirs-male, viz. sons took before; that translating the word *so* into Latin, it would be *eodem modo*, as the four first sons; and that the proviso for charging the land with portions for daughters of *E.* if he should die without issue was unnecessary, if *E.* was to take an estate-tail, by which he might do it without such a proviso. The court held the words *and so*, &c. to be words of relation, and gave judgment for the plaintiff. Upon which a writ of error was brought in the Exchequer-chamber, where it seems the judgment was affirmed, as is observed by Judge Tracey, 1 P. W. 90. who, it appears, had searched the record, the reports differing in that matter.

Now it is evident that in both the cases of *Walker v. Snow*, and *Lisle v. Gray*, the general import of the words *heir or heirs*, &c. was qualified, by reference to the preceding distinct and particular limitations to the first and certain other sons in tail, and also by words of limitation grafted on them.

Again, where a devise was to *B.* and his heirs lawfully to be begotten, *that is to say*, to his first, second, third, and every son and sons successively, lawfully to be begotten of the body of the said

Lawe v. Davies.

2 Ld. Raym.
1561.

said *B.* and the heirs of the body of such first, second, third, and every other son and sons successively, lawfully issuing as they should be in seniority of age and priority of birth, the eldest always, and the heirs of his body, to be preferred before the youngest and the heirs of his body, remainder over, &c. It was adjudged that *B.* took but an estate for life; for that the subsequent clause was not contrary to the preceding general limitation to *B.*'s heirs lawfully to be begotten, but explanatory of what heirs, &c. were meant. Not one of these cases therefore is analogous to the case of *Perrin v. Blake*, in which the general limitation to the heirs of the body stood entirely uncorrected and unexplained by any kind of preceding or subsequent limitation to sons, daughters, or children in any manner whatsoever.

1 Salk. 224.
Ld. Raym.
203. Luddington v. Kime.

In the case of *Luddington v. Kime*, where *A.* devised land to *B.* for life without impeachment of waste, and in case he should have any issue-male, then to such issue-male and his heirs for ever, upon a question whether this subsequent limitation to the issue-male of *B.* made *B.* tenant in tail or not, it was held that it did not, but was a contingent fee to the issue-male. Now this was not only a limitation to the issue-male instead of heirs, &c. but that limitation was even accompanied by superadded words
of

of limitation *in fee* grafted on the words *issue-male*, which circumstances carry this case quite out of the rule I am treating of. So the case of *Backhouse v. Wells* was a limitation to one for life *only*, and after his decease to the *issue-male of his body*, and to the *heirs-male of the bodies of such issue*. Here also the word *issue* was used, and words of limitation were grafted on it; and it is to be remembered that the word *issue* itself even unattended with any engrafted words of limitation upon it, is often a word of purchase, where the word *heirs*, (or even *heir* in the singular number) is not; for which vide *Cro. Eliz.* 40. 1 *Vent.* 230. 2 *Strange* 731. And in the case of *Backhouse and Wells* it is observed, that Lord Chancellor *Parker* said, had the words *heirs male* been used instead of *issue-male*, the operation of the law would have been too strong for the intention of the testator.

1 *Eq. Abr.*
184. pl. 27.
Backhouse
v. Wells.

2 *Strange,*
731.
2 *Ld. Raym.*
1440.

In the more modern case of *Doe and Laming*, which was a devise of gavelkind lands, to *A.* and the *heirs of her body* lawfully begotten or to be begotten, *as well females as males*, and to their *heirs and assigns* for ever, to be divided equally, share and share alike, as *tenants in common*, and not as joint-tenants; it was held that the word *heirs of her body* did not operate as words of limitation, nor consequently create an estate-tail in *A.* For here these words
did

2 *Burr.* 1100.
Doe v. Lam-
ing.

did not stand independent and unqualified, but were corrected and explained, very expressly, by the words which followed and were coupled with them; the words *as well females as males*, annexed to the words *heirs of the body*, were incompatible with and expressly broke the descent, because gavelkind lands cannot descend in that manner; and the devise expressly created a tenancy *in common*, which was impossible by descent, as that must have been in coparcenery; and besides there were words of limitation *in fee* grafted on the words *heirs of the body*, which could not have been satisfied by an estate-tail in the ancestor.

Vide infra,
p. 112.
Allgood v.
Withers,
cited 2 Burr.
1107.

As to the cases of *Leonard v. Earl of Sussex* cited hereafter, and that of *Allgood v. Withers* in Chancery in 1735, (where *A.* conveyed freehold and leasehold lands to trustees in trust to apply the rents and profits to *C.* for her life, and after her death to the *heirs of the body* of the said *C.* and of *D.* and of *E.* and of *F.* their *heirs, executors and assigns*, in which case Lord Talbot held that *C.* took only an estate for life, and that her heirs took as purchasers) as well as the case of *Bagshaw and Spencer* above noticed, they were all cases of *trusts*, and therefore, like all other cases of that description, are no authorities (even in the court of Chancery) for the construction in cases of *legal estates*; as I conceive is sufficiently proved by the several cases

cases I have already cited, to shew the distinctions taken, by the court of Chancery itself, between *legal* and *trust*-estates, in regard to the force of that rule which I am now treating of.

There are also two other classes of cases, which have been cited as authorities against the force of the rule now in question, the one consisting of the cases of *Burchett* and *Durdant*, and *Newcomen* and *Barkham*, and *Beaumont* and

Vide *infra*.

Long, (all noticed in a subsequent part of this essay) and other cases where the ancestor either took only a *trust*-estate, or else no preceding freehold estate at all; the other consisting of the cases of *Peacock v. Spooner*, and *Hodgson v.*

Vide *infra*.

Bussey, (which are likewise considered in their proper place in this tract) together with others of the same kind, which relate to the trusts of a term, and have nothing to do with the case of an inheritance. Of all these I shall take no further notice in this place: for the question is not, Whether the words *heirs of the body* may not, under certain circumstances, be taken as words of purchase; but, Whether those words, standing perfect independent and unexplained, and preceded by a limitation of the legal freehold to the ancestor in the same will, have ever been construed words of purchase? After the observations I have been making, upon the several rules above cited, I conceive no one of these cases can be fairly urged, in support

port of an affirmative answer to this question ; and as to all those other cases wherein the legal freehold is not limited to the ancestor, they are entirely foreign to the point in question.

Where is the man who would not have concluded (there surely is no one who could not have wished) that the several cases in which this point had so often been agitated, and so repeatedly determined, had settled the law in regard to it, so as to enable gentlemen of the profession to form some probable conjecture at least, if not opinion, respecting the merits of any question of this nature, upon which they might be applied to for their advice? And how much is it to be regretted, that a case should ever arise of so unfortunate a complexion, as to induce the court of King's Bench to explode so natural a conclusion, and to frustrate so reasonable a wish? The case I am alluding to is that of *Perrin and Blake*, before that court in the year 1769 ; a case directly in point, and wherein that court delivered a judgment, which seemed to over-rule and supersede all authorities and precedents, and to assume the air of authoritative repeal of all former opinions and resolutions upon the same point.

Perrin v.
Blake.

The case was this, one *W. Williams* seized in fee of a plantation in *Jamaica*, devised in the following words : Should my wife be enſient with

with child, at any time hereafter, and it be a female, I give and bequeath unto her the sum of 2000*l.* &c. and if it be a male, I give and bequeath my estate, real and personal, equally to be divided between the said infant and my son *John Williams*, when the said infant shall attain the age of twenty-one. *Item*, It is my intent and meaning, that none of my children should sell or dispose of my estate for longer time than his life, and to that intent I give, devise, and bequeath all the rest and residue of my estate to my son *John Williams* and the said infant for and during the term of their natural lives, the remainder to my brother-in-law *J. G.* and his heirs for and during the lives of my sons *John Williams* and the said infant, the remainder to the heirs of the body of my said sons *John Williams* and the said infant lawfully begotten or to be begotten, the remainder to my daughters, &c." No other son was born, and the question was, what estate *John Williams* took under this will?

Had this been the case of a *trust-estate*, the court of Chancery, it may be presumed, would have construed it an estate for life in *J. W.* upon the clause expressing the testator's will, that his sons should not convey a greater interest than for their lives. But as it was the limitation of a *legal* and not a *trust-estate*, the court of Chancery itself (in conformity to its own established distinctions above explained) we must conclude,

conclude, would have decreed it an estate-tail in *F. W.* Could this be questioned, after the cases I have before cited, the several cases which I am now about to consider would put it entirely out of doubt.

2 Vern. 526.
Leonard v.
Earl of Suffex.

Indeed there is one very particular case which goes directly to this point, I mean the case of *Leonard v. The Earl of Suffex*, where *A.* devised lands to trustees and their heirs, for payment of debts and legacies, and then to convey one moiety of the residue to *H.* and the heirs of his body by a second wife, and in default of such issue to her son *F.* and the heirs of his body, remainder over; *taking special care in such settlement, that it never be in the power of either of my said sons F. or H. to dock the intail of either of the said moieties given them during their or either of their life or lives:* now restraining the sons from docking the intail, was exactly the same thing as restraining them from conveying a greater interest than for their lives: for without docking the intail it was impossible they should convey any greater legal interest; yet the court of Chancery there held, that if it had been a legal instead of a trust limitation, the sons would have been *tenants in tail* notwithstanding that restrictive clause. And Lord Talbot afterwards in the case of *Lord Glenorchy v. Boswell* said, that in the case of *Leonard v. The Earl of Suffex*, had it been by act executed

cuted, it would have been an estate-tail, and the restraint had been void; but being an *executory trust* the court decreed according to the intent, as it was found expressed in the will. And so likewise Lord *Hardwicke*, in the later case of *Bagshaw v. Spencer* (before cited) said, that if the case of *Leonard v. Earl of Sussex* had been a *legal estate*, the sons would have been *tenants in tail*; but in equity upon a *trust-estate*, the clause for interposing trustees, &c. governed the whole case.

Caf. Temp.
19.

2 Atk. 581.
1 Vezey 149.

But notwithstanding all this, the stronger discernment of the court of King's-Bench in the case of *Perrin v. Blake*, told them, that those distinctions were too refined and nugatory, and ought not to be abolished, however they might have suited the narrow strictness of preceding times. And though it is true, that these very distinctions had hitherto been received and adopted even by a court of equity itself, it was nevertheless impossible to reconcile them, in any degree, with that enlarged and more enlightened stile of doctrine, which, at this period, so eminently distinguished the decisions of the court of King's-Bench; nothing therefore remained but to explode these old illiberal distinctions, by some solemn resolution directly in point; and accordingly the court of King's-Bench adjudged that *J. Williams* took only an estate for life under the devise in question.

It is true, indeed, that the late Judge *Nates* (a very respectable authority) who then filled a seat on that bench, opposed the decision with great depth of learning and solidity of argument; but unfortunately his arguments were drawn from sources much too *antiquated* to meet with the attention, which many people conversant in these matters, are even still so old fashioned as to think, they merited.

Singular however as the opinion of Judge *Nates* was in the court of King's-Bench, it afterwards appeared, that the majority of the judges in the Exchequer-chamber were influenced by the same strict attachment to old established rules of law; and accordingly reversed the new decision of the court of King's-Bench, and thereby restored the venerable uniform train of preceding judgments upon the same point, to its former authority. I shall therefore consider those judgments as once more intitled to our attention, and accordingly present the reader with a concise view of them.

2 Ventr. 311.
Burchett
v. Durdant.

The first case I shall mention, was a devise of land to a trustee, and his heirs, during the life only of *A.* upon trust, to permit and suffer *A.* during his life to receive the rents and profits, without impeachment of waste, and after the decease of *A.* then to the heirs-male of the body
of

of *A. now living*, and to such other heirs, male, and female, as he should afterward have of his body. In that case it seems the first question was, whether the estate for life did not execute in *A.* by the statute of uses, for if so (says the reporter) he would be seised of an estate-tail. But the court resolved the first limitation was a *trust*, and not an estate executed. Now this was a point the court had no occasion to have entered into, or have given any resolution upon, if the other and principal point, of the subsequent limitation's vesting or not in the ancestor, had not depended upon it : therefore it follows, that if the estate for life had been executed, and not a mere *trust*-estate, the subsequent limitation would have vested in the ancestor, notwithstanding the strong intention of the testator to the contrary.

So where a testator, by his will, devised lands to trustees and their heirs, and declared that the said trustees and their heirs should stand seised of the lands to the uses, intents and purposes therein after mentioned, that is to say, to the intent and purpose to permit and suffer *A.* to receive and take the rents and profits for and during the *term of his life*, and after his decease should stand seised of the lands to the *use of the heirs of the body of A.* remainder over ; with a proviso, that the *said trustees and the said A.* might make a jointure for his wife ; the ques-

Broughton
v. Langley,
2 Ld. Raym.
873.
2 Salk. 679.

tion was, whether *A.* had an estate-tail executed or not? And it was adjudged he had. For *Holt* C. J. said, that this would have been a plain trust at common law, and what at common law was a trust of a freehold or an inheritance, is executed by the statute, which mentions the word *trust* as well as *use*. And it was held that a power to make a jointure does not necessarily exclude an estate tail, because as tenant in tail cannot make a jointure without discontinuing or barring the intail, such power has its use. And *Holt* in this case denied the case of *Burchett* and *Durdant* to be law.

Now, though the power of making a jointure is itself, perhaps, not a sufficient ground upon which to deny that construction, which gives an estate-tail, yet the circumstances attending that power in the present case, seemed to be very strong against an estate-tail, that power being made to depend upon the consent and concurrence of the trustees, and they being required to join in the executing it, and of course in the conveyance for that purpose; which seems to have been an evidence of the testator's intention, that the estate should remain in them, and consequently that he did not intend *A.* should take any legal estate at all, much less an estate-tail. But, however, the strength of the general rule prevailed against these arguments of intention.

So

So where one bequeathed the surplus of his personal estate to be laid out in lands, to be settled on *B.* his nephew for life, and after his decease to the *heirs male of the body of his said nephew* lawfully to be begotten, and the *heirs-male of the body of every such heir-male severally and successively as they shall be in priority of birth, every elder and the heirs male of his body to be preferred to every younger*; and for want of such issue to his Brother *C.* for his life, and after his decease to the heirs-male of his body begotten, &c. *B.* upon a bill brought by him against the executor, to which *C.* was no party, obtained a decree to have the money paid to him, instead of being laid out in a purchase, suggesting that if the money was to be laid out in a purchase, he was to be made tenant in tail of the land by the said will, and might immediately bar it; he afterwards died without issue, and thereupon *C.* brought his bill for an account of the estate, alledging that *B.* was not to have been tenant in tail. Upon this question it was contended, on the behalf of *C.* that it was evident from the frame of the will that *B.* was intended to be only tenant for life, and not to have power to bar his issue; and then a court of equity would decree it to be settled according to the intent, and the case of *Leonard v. Earl of Suffex* was cited. On the other side it was insisted, that if the latter words in this will (*and to the heirs-*

Legate v.

Sewell.

1 P. W. 87.

1 Eq. Abr.

394.

heirs-male of the body of every such heir-male, &c.) signify any thing, it is no more than what was included in the first, and then *expressio eorum quæ tacite insunt nihil operatur*. Lord Cowper said, there having been a decree already in the case, it must depend on what it was at law, and he was inclined to think the judges there, might take it as an estate-tail; he therefore directed a case to be made for the opinion of the judges of K. B. upon which three judges against one held that it was an estate-tail. Though *P. Williams* says the parties agreed, yet in (1 *Vez.* 507.) Lord *Hardwicke* says that Lord Cowper thought himself bound to agree with the three judges, and so decreed.

2 *Ld. Raym.*
1437.
Goodright
v. Pullyn.

So where a testator devised lands to *N.* for his life, and after the decease of the said *N.* he devised the same unto *the heirs of the body* of the said *N.* lawfully to be begotten, and *his heirs* for ever; but if the said *N.* should happen to die without *such heir-male*, then he devised the lands to *B. &c.* The question was, whether *N.* took an estate tail or for life only by the will? It was contended on one side, that the testator intended him only an estate for life, by his devising it to him expressly for life; and then here were the superadded words, *his heirs for ever* engrafted on the words *heirs males*; that though these words *heirs males* were

were in the plural, yet the subsequent words *his* and *for default* of such *heir-male* qualified them, so as to make them signify the same thing as *next heir-male* in *Archer's* case. But however the judges were all unanimous in opinion, that *N.* took an estate tail, that the rule was *settled so firmly that it was not to be disputed.* They held that the subsequent words *his* and if he dies without *such heir-male*, were not sufficient to restrain and alter the operation of the words *heirs male*, and so qualify them as to make them a description of the person; and they all agreed that the operation of plain and clear words, and a settled rule of law, should not be defeated or broke into by uncertain or doubtful words.

So in a case before the council in 1730, (at which Lord *Raymond* and Lord C. J. *Eyre* were both present) upon an appeal from *Barbadoes*, wherein the testator devised to *L.* *for life* then to the *heirs of the body of L.* and *their heirs*, and if she died without *such heir* of her body, then over. This was holden to be an estate-tail in *L.*

Morris v.
Le Gay,
cited 2 Burr.
1102.

So where lands were devised to trustees and their heirs in trust to convey them to the use of *D.* for her life, without impeachment of waste (voluntary waste in houses excepted) remainder after her death to her husband for life,

Lord Glenorchy v. Bosville.
Cas. Temp.
Talbot. 3.

life, remainder to the *issue of her body*, remainder over. Upon the question whether *D.* became intitled to an estate in tail or only for life under this devise? Lord *Talbot* said, he should upon the first question make no difficulty of determining it an estate tail, had it been an immediate devise. Now in this case the subsequent words were *issue of the body*, instead of *heirs of the body*, which puts Lord *Talbot's* opinion in favour of the general rule, in a very strong light, when we consider that the word *issue* is not so appropriated a word of limitation as the word *heirs*, as I have observed in a preceding page.

Vide *supra*,
P. 95.

So in the case of *Papillon* and *Voice*, which I have before cited, where lands were devised to *B.* *for life without impeachment of waste*, remainder to trustees and their heirs during the life of *B.* to support contingent remainders, remainder to the heirs of the body of *B.* remainder over. Lord Chancellor *King* agreed that the intent was plain to give an estate for life only, with a contingent remainder of the inheritance, upon the clause appointing trustees to preserve contingent remainders; yet held, that this remainder was within the general rule, and must operate as words of purchase, and consequently create a vested estate-tail in *B.* and that the breaking into this rule would create the utmost uncertainty.

Again,

Again, in the case of *Coulson and Coulson* in Chancery, which was a *devise to C. for life*, remainder to *A. and B. and their heirs to support contingent remainders* during the life of *C.* remainder to the *heirs of the body of C.* lawfully begotten. Upon a question, whether *C.* took an estate tail or for life, a case was stated for the opinion of the judges of *B. R.* who all certified that an estate-tail in remainder vested in him.—Here it was the intent of the testator to give only an estate for life, if he meant any thing by the interposition of trustees to support contingent remainders; for if he did not intend such an estate, as might determine by forfeiture or otherwise in *C.*'s life-time, there was no room for the estate to trustees during the life of *C.*; and unless he meant that the heirs of *C.* should take by purchase, and not by descent, there were no contingent remainders to be supported. (A)

2 Str. 1128.
2 Atk. 246.
Coulson v.
Coulson.

So

(A) The reader, most probably, will think the determination in the case of *Coulson and Coulson*, was sufficient to have closed the question, and removed all ground for any further disputes upon the same point. And indeed both the bench and the bar seem to have acquiesced in this opinion, till the judgment of the court of King's Bench, in the case of *Perrin and Blake*, ripped up the matter again, and opened new sources of uncertainty, dispute, and litigation, by reducing the point

Sayer v.
Masterman.

So in a subsequent case of *Sayer* and *Masterman* in Chancery in 1757, before the lords commissioners of the Great Seal, *Willes*, *Smythe*, and *Wilmot*, where there was a devise in the following words, viz. "And in case I die, not
" leaving issue born at the time of my death,
" or *en ventre sa mere*, which shall afterwards
" be born alive, I do further give and devise
" after the death of the said wife, to my brother *E. S.* all those my several estates or
" farms at, &c. during his natural life, with
" power of making any jointure or jointures
" upon any woman or women he shall marry,
" and after his decease to such child or children

point to a question of discretionary construction. That the bench in general considered the case of *Coulson* and *Coulson* as a ruling authority, appears as well by the decision in the subsequent case of *Sayer* and *Masterman*, as by the reversal in the court of Exchequer-chamber, of the judgment given by the court of King's-Bench, in the case of *Perrin* and *Blake*. And that the same opinion influenced the bar in general, I am induced to believe, as well from the sentiments I have heard many eminent counsel express in regard to the matter, as from the perusal I have been favoured with of, what I am told are, the copies of the opinions of several of the greatest lawyers of the age, whose names, it appears, those copies bear; and which opinions, I am informed, (as the copies themselves indeed import) were given upon the same devise, which was the subject of the question, in the case of *Perrin* and *Blake*.

All

"dren as shall lawfully be begotten by him,
 "the males however to be preferred before
 "the females, and they to succeed according
 "to their births; and in trust to preserve
 "the contingent remainders from being barred
 "during the life of the said *E. S.* I do give
 "the said several estates and farms to my
 "dear friend Dr. *J. R.* and after the de-
 "cease of my said brother, and on failure of
 "issue as aforesaid, I give the said several
 "estates and farms to my loving brother
 "*G. S.* and *the heirs of his body, the males hav-*
 "*ing preference as aforesaid, and succeeding*
 "*according to their births, and to preserve*

All these opinions (if the copies which I have seen
 speak true) concur in giving an estate-tail to *J. Williams* ;
 among these copies, I have seen some of an opinion,
 which if really given by the great person to whom it is
 ascribed, and whose names the copies bear, cannot be
 mentioned without the utmost respect ; for it is said to
 have been given by the present Chief Justice of the court
 of King's-Bench, he being then his majesty's solicitor-
 general ; and therefore I dare not assume the liberty
 of communicating the purport of this opinion to the read-
 er in any more compendious terms, than the very words
 of the copies which I have seen, which are as follow :
Upon the authority of the case of Coulson and Coulson,
though I am aware how far the expression here differs
from that case, I think the remainder to the heirs of the
body of John will operate as a limitation to him in tail,
which by a recovery properly suffered he may dock.

10th Apr. 1747.

W. Murray.

" the

" *the contingent remainders from being barred during the life of the said G. S. I give the said estates and farms to my said friend Dr. R. and on failure of issue of the said G. S. I give the said estates and farms to my said niece M. C.*" *E. S.* died without issue. The question was, whether *G. S.* took an estate-tail or only an estate for life under the said will? And the court determined that he took an estate-tail.

King v.
Burchel, cited
2 Burr 1103.

In another case before Lord Keeper *Henley* in 1759, where a testator devised lands to *J. H.* for his life, then to the *heir-male* of *J. H.* and *his heirs*, and for want of such issue then over. It was held that *J. H.* took an estate-tail, notwithstanding the word *heir male* was here in the singular number, and attended with superadded words of limitation in fee.

Goodright
v Wright,
1 P. W. 397.

Lastly, I shall mention one more case, tho' prior in time to several already noticed; which was a devise to *A. and his issue*, remainder to *B.* and his issue, remainder to the *heirs* of *A.*—*A.* died in the life-time of the testator, and it was adjudged by the whole court, that the heirs of *A.* took nothing, because the word *heirs* was a word of limitation; the words of Lord Chief Justice *Parker*, in delivering the opinion of the court upon this case, are remarkable:

markable : “ And thus (says he) has the law
 “ been long clearly settled as to this point,
 “ ever since *Brett* and *Rigden's* case; but on
 “ this occasion I have been the larger in deli-
 “ vering the judgment of the court, because
 “ of some *late endeavours* to invalidate this rule,
 “ which by the way may make it proper to
 “ observe, that the *altering settled rules* con-
 “ cerning property, is the most dangerous
 “ way of removing land marks.”

I doubt not that the reader's curiosity is on the stretch, to learn, upon what principles, it was possible to get rid of so strong a system of authorities as the foregoing. And, I confess, I know no other way of abating his wonder upon this occasion, than by directing his attention to that extraordinary liberality of sentiment which, at this period, had diffused itself through the court of King's-Bench, and taught the majority of the Judges there, to reason and decide, upon grounds of a much larger scale, than had before found reception within the rigid illiberal pale of *Westminster-hall*. Old cases, it could not be denied, did very well for old times. But did not those cases and those times keep equal pace, and both grow *antiquated* together? New times called for new decisions. In other sciences we find that every age produces its own discoveries, and detects the errors of preceding times;

times; and why is the science of the law to be the only stationary branch of human knowledge? Is not that likewise incumbered with the errors of past ages which call for the corrections of modern ingenuity? The herd of mankind, it is true, do well to adhere to old rules, for want of capacity to strike out better. But men endowed with superior talents are to look higher; and instead of betraying a supineness of spirit by a servile attention to precedents, they are to exert their abilities in the great field of improvement, and distinguish themselves by their activity in reprobating the quaint tenets of their forefathers, and introducing new doctrines more suitable to the improved policy of their later times. In this manner they will most effectually pursue the laudable ambition, of founding an original merit in themselves, for

————— *proavos eo quæ non fecimus ipsi*
Vix ea nostra voco —————

It is to reflections of this nature, we are to have recourse, in order to moderate our surprise, when we are told, that in the case of *Perrin* and *Blake*, the court of K. B. expressly held, that precedents are in general to be discarded, for that they serve only to confound, and that every case ought to stand upon its own bottom; that wherever an old maxim, the policy of which had ceased, could justly be departed from, it ought to be done; and that
every

every thing which favours of ancient strictness, ought to be discountenanced and exploded. Such, I am informed, was the language of that court in delivering their opinion upon that case; and such, I conceive, are the only ideas which could dictate the judgment then pronounced.

It is true, that, in the arguments upon the case of *Perrin and Blake*, it was insisted, that several of the cases, which I have before observed to have been cited in support of the determination in that case, were instances of the words *heirs of the body* having been taken as words of purchase; and that, as to the cases cited in support of the rule, all those wherein there was no limitation to trustees to support contingent remainders, were not strictly applicable to the question in that case; that the intention was plain to make the heirs of the body take by purchase; the cases adduced, wherein they had been admitted to take as purchasers, proved there was nothing contrary to law in such intention, and therefore such intention ought to be effectuated.

But upon this sort of arguments, we are to observe, that in regard to the cases wherein the words *heirs of the body* were admitted to operate as words of purchase, there is not one of them that falls within the literal extent of the rule; which, I conceive, sufficiently appears, from the observations I have made in my examination
of

of those cases. Therefore, though it was not *illegal* to construe the words *heirs of the body* to be words of purchase, in cases that did not fall within the rule of law, which says they shall be words of limitation; that proves nothing in regard to the *legality* of such construction, in another case which wants every one of the circumstances, that took those cases out of the extent of that rule. And as to the cases, which want the limitation to the trustees to support contingent remainders, not being applicable to the question in the case of *Perrin and Blake*, it must be allowed, that many at least of those cases contain strong arguments of intention (as strong, perhaps, as that of limiting an estate to trustees to support contingent remainders) that the heirs of the body should take by purchase; and therefore such cases directly apply to prove this general position, *viz.* that in those cases to which the rule of law, now under consideration, extends, that rule is sufficiently strong to control the plain intention.

Besides, without recurring to any other cases, why are not the authorities of the three cases of *Papillon and Voice*, *Coulson and Coulson*, and *Sayer and Masterman*, in every one of which there was a limitation to trustees to support contingent remainders, sufficient to rule the case of *Perrin and Blake*? And indeed upon examining the matter, the limitation

tion in these cases to trustees to support contingent remainders, seems to set the force of the two arguments upon the intention, and upon the testator's being *inops concilii*, in direct opposition to each other. For if we suppose the testator acquainted with the necessity and use, of limiting an estate to trustees to support contingent remainders, it scarcely seems reasonable, to suppose him unacquainted with the legal nature and force, of a limitation to the *heirs of the body* after a preceding estate for life : and then as we cannot say he is *inops concilii*, there exists no pretence for construing his words otherwise than according to their legal import and operation. On the other hand, if we admit he did not understand the use or intention of the limitation to trustees to support contingent remainders, but only used it because he had seen it used in some other will or settlement, then no particular intention can be inferred from his inserting that clause.

It may, indeed, be admitted that those who shall argue against the strict observance of the rule I have been speaking of, may sometimes chance to have the intention of the testator on their side ; but let them consider whether a rule of law, inviolably observed for more than three hundred years past, can ever be a decent sacrifice to the presumptive construction of an indetermined or illiterate testator's intention.

So long as certain technical expressions shall be allowed their fixed legal import and operation, it will be in any man's power to secure the limitation of his property from litigation and arbitrary construction, by applying to those whose business it is to be acquainted with the force and import of such expressions. Where any considerable property is concerned, a man's own interest in securing the effect of his intention will lead him to such a step; where the property is so inconsiderable as not to be thought worth the trouble or expence of such assistance, the disposition of that property, and of course the testator's intention with respect to it, is less material and momentous. Some cases, it is true, may happen, wherein such application may accidentally be impracticable; but is every testator to be denied this power of effectuating his intention, because accident may put it out of the reach of some few, and some others may want inducement to use it?

If no technical expressions are to be exempt from the operation of an occasional discretionary construction, where is the testator who can make his own will? The most careful and guarded endeavours which a man shall exert for that end, will only amount to leaving some precarious instructions behind him, the force and effect of which, must depend on the discretion or disposition of those, in whom the power of construction shall be reposed for the time

time being ; it is their discernment, humanity or spirit of improving old laws, must in fact *make* the will of every testator in the kingdom.

It is true that the court of King's Bench, in delivering their opinion upon the case of *Per-
rin v. Blake*, seemed to lay a considerable stress upon arguments of *convenience* and *policy*. But, I must confess, that all which I have heard urged upon those grounds, so far from supporting the judgment in that case, appears to me to afford very solid reasons against it. It was said that the established distinction between *legal* estates and *trusts* might be attended with inconveniencies, from the difficulty which sometimes might occur in determining whether a limitation gives a trust or legal estate. But this is a difficulty of that sort which rarely, very rarely, has ever occurred ; and upon the long established rules of construction very rarely can occur. It is impossible, indeed, to say what variety of new questions, new principles of construction may introduce ; but certain it is, that whilst old distinctions between the words creating *trusts* and *legal estates* shall prevail ; for every single question that can arise, as to the effect of a limitation in that respect, at least *an hundred* disputes must arise about the discretionary construction of a testator's intent : in the case of *Bagshaw v. Spencer* (as doubtful a case of that

2 Atk. 245.

370, 377.

Supra, p. 84.

that fort as probably can ever occur) the *Master of the Rolls* clearly agreed with Lord *Hardwicke*, as to its being a trust-estate, though the first denied that latitude of construction even to a *trust*-limitation which the other admitted upon the score of its being a *trust* and not a *legal* estate.

It was also observed in the arguments in the case of *Perrin v. Blake*, that in a commercial country, every clog should be removed which tends to obstruct the circulation of property : But, how the decision in question can be supported on such a ground, I am at a loss to apprehend.

The construction adopted by the court of King's-Bench in the case of *Perrin v. Blake*, so far from unlocking property, really ties it up for a longer period, and imposes a more strict clog upon it, than the limitations commonly used in marriage-settlements, where the lands are strictly settled upon the husband for life, remainder to trustees to support contingent remainders, remainder to the wife for life, remainder to the first and other sons successively in tail — ; for in such settlement the first son that attains the age of twenty-one years may, with the consent and concurrence of his father, by suffering a recovery, unfetter the estate, and make a new settlement upon his marriage, or other desirable occasion. But
it

it is quite otherwise in regard to a limitation to the father for life, remainder to trustees to support contingent remainders, remainder to the heirs of the body of the father, if we construe the subsequent words *heirs of the body*, as words of purchase, giving a contingent remainder to the heir of the body; for then, as *nemo est hæres viventis*, it is impossible to say who will be heir of the father's body till his decease; and consequently it will be out of the power of the father and eldest, or any other child, to make any secure and effectual disposition or settlement of the estate, either upon marriage or any other the most important or advantageous occasion. The inheritance must remain suspended during the father's life, and though he should have half a score children, yet should he live to an old age, and survive them, the estate cannot vest in any of them; but may, perhaps, become the property of some remote remainder-man, whose name possibly was inserted in the will, only to wind up the general round of limitations.

It is true, if the example of the court of King's-Bench in the case of *Perrin v. Blake* were to be followed by our other courts of justice, and the same liberal mode of construing wills, were to be once fully established, it would open an almost unlimited power to the judge, of disposing of the property of testators,

tors, and directing the circulation of it to his own mind ; and that, I take it, is the only sense in which it could fairly be said to remove any *clog* upon the circulation of property.

If rules and maxims of law were to ebb and flow with the taste of the judge, and to assume that shape, which in his fancy best becomes the times ; if the decision of one case were not to be ruled by or depend at all upon former determinations in other cases of a like nature ; I should be glad to know what person would venture to purchase an estate, without first having a judgment of a court of justice, respecting the identical title under which he means to purchase ? No reliance could be had upon precedents ; former resolutions upon titles of the same kind could afford him no assurance at all. Nay even a decision of a court of justice upon the very identical title, would be nothing more than a precarious temporary security ; the principles upon which it was founded, might, in the course of a few years, become *antiquated* ; the same title might be again drawn into dispute ; the taste and fashion of the times might be improved ; and on that ground a future judge might hold himself at liberty (if not consider it his duty) to pay as little regard to the maxims and decisions of his predecessor, as that predecessor did to the maxims and decisions

sions of those who went before him. Thus, so far from opening a door to the circulation of property, the prevalence of such a doctrine must prove the most effectual obstacle to it; for men will be very cautious how they venture upon the purchase of property, the enjoyment of which must depend wholly upon such fluctuating temporary rules of construction.

Another plausible ground advanced in support of the judgment of the court of King's-Bench in the case of *Perrin v. Blake*, still remains to be examined. It was there laid down as a principle, that the intention of the testator should be the sole rule of construction, in all cases of devises; and that such intention when explained, should control the legal import of any term of art. That a principle of this nature, under certain limits and restrictions, does and ought to prevail, I believe no one conversant in our laws will attempt to deny; but that such a principle has never yet been admitted, in the latitude there laid down, seems to be proved beyond controversy by all the several cases I have before cited. And that no such unlimited principle ought ever to prevail, may, I think, be clearly demonstrated from the infinite uncertainty, inconvenience, and vexation, which it must necessarily produce.

Vide also
2 Ark. 575.
576.

Certain established maxims, as to the legal import and effect of technical expressions, will
render

render the decision of titles to property as little dependent as the nature of things will admit, upon the occasional opinion, humour, ingenuity, or caprice of the judge, and are therefore the most proper and sure grounds for titles to rest and depend upon. Titles so founded may be easily and clearly ascertained; and under them a permanent peaceful enjoyment may be expected.

Construction depending on, and guided by certain fixed known rules, will not be liable to those various temporary influences, which must necessarily have a share in directing the discretionary decision of any court upon earth: no inducements therefore can arise, no room can be left to dispute or litigate titles built on such a stable foundation. Whereas, on the other hand, the implied intention of a testator is at best uncertain; frequently very doubtful; favour, affection, caprice, nay different habits of thinking, and modes of expression in different men, will occasion different constructions of the same will. Very often, I'll venture to say, a testator himself would be at a loss to fix or expound his own intention, when the reason, humanity, or ingenuity of a judge, might conceive it clear as day-light. Whoever has been conversant in settling the wills of testators, must often have experienced the truth of this position; and if a testator himself is at a loss to

to ascertain or expound his own intention; we are certainly not to wonder, that other men should differ widely in their constructions of it. What reliance can be had on a title raised on so precarious a ground? What security of enjoyment can be expected under it? Setting aside all those grounds for differences in the construction of the same will, which may arise from different degrees of understanding, apprehension, or discernment in different men, it is certain, that different ambitions, interests, party principles and connections, will ever lead men to differ and dispute as much about the construction of a will, as about any other act in which they are concerned.

It is evident, therefore, no sort of reliance can be had upon titles depending on DISCRETIONARY CONSTRUCTION, until they have received the sanction of a court of justice; a suit commenced in one court in cases which depend upon such construction, generally produces an appeal to a superior court; thus are vexatious suits continually encouraged and multiplied; innocent people perpetually harassed; and estates spent ten times over, in endeavouring to ascertain the titles to them. These seem to be the necessary fruits of the unlimited principle laid down and adopted by the court of King's Bench,

Bench, in their decision of the case of *Perrin v. Blake*.

For these reasons I think it clear, that the intention of the testator should never be so far indulged, as to control all established rules of construction. Wherever the construction, upon the apparent intent of the testator, is not contrary to the construction upon certain established legal maxims, respecting the import of terms made use of by him, so far let the apparent intent be the guide in the construction, but not one jot further; and wherever the terms of art made use of, do not fall within the allowed extent of any established legal maxim respecting their import and operation, there let the intent be the sole guide of construction, because there, a more certain or better rule of construction is not sacrificed to it. These are distinctions which have long since prevailed in our courts of justice; and as they appear to be founded in good reason, and permanent useful policy, it is to be hoped the supreme court of judicature in this kingdom, will not suffer them to be controlled by any temporary notions of any other court whatsoever.—Surely it is better that the intentions of twenty testators every week should fail of effect, than that those rules should be departed from, upon which the general security

security of titles and quiet enjoyment of property so essentially depend.

Where, in the name of wonder, can be the convenience, where the policy, of directing our attention and solicitude to substantiate the conjectural intentions of the dead, at the expence of so much perplexity, strife, litigation, and distress to the living? How much more rational and better calculated for the great ends of society, is the doctrine recommended by Lord Mansfield in the case of *Doe and Laming*, where his Lordship's words, as reported in *1 Burrow 1106*. merit our most serious attention, no less for the justness of the observation, than for the real importance and utility of the advice they contain. "It is to be LAMENTED (says that great Judge) that questions of this kind have occasioned so much LITIGATION and EXPENCE. The BEST way to SETTLE them is to reduce the matter, if possible, to some CERTAIN RULES."

I shall now proceed to remark, that although words of limitation grafted on the words *heir male, or heir of the body* in the singular number, may in some cases convert them into words of purchase, as in *Archer's* case, and in the case of *Cheek*, or *Clerk and Day*, before cited; yet those words, though in the singular number, if not attended with words of limitation upon them, are not words
of

Miller v. Sea-
grave, Robin-
son's Gavel-
kind, 96.

of purchase. As, where there was a devise to *M.* and his wife for their lives, remainder to the *next heir-male* of their two bodies; it was held a devise in tail, for that a devise to the heir-male was a devise in tail, unless there are words of limitation superadded, so as to bring it within the reason of *Archer's* case, and that the words *first*, *next* or *eldest* make no difference.

Trollop v.
Trollop, *ibid.*

So in the case of a devise to *A.* for life, remainder to the heirs-male of his body, remainder to *T. for life*, and after his death to the *first heir-male* of his body, remainder over; the court of C. B. held that the words *heir-male* were to be understood collectively, and gave an estate-tail to *T.* it being distinguished from *Archer's* case by no limitation being superadded to the words *first heir-male*, and the word *first* signifying *first* in order of succession from time to time, and the court of King's-Bench affirmed the judgment in C. B.

Nor indeed is it universally true, that those words in the singular number followed by words of limitation, will operate as words of purchase; for the case of *King v. Burchell* above noticed, shews, that even where those words are in the singular number, and attended with superadded words of limitation, still they may operate as words of limitation, and not of purchase.

chafe. But if the words be *heirs-male*, or *heirs of the body* in the plural number, in that case it seems even words of limitation ingrafted on them, will not, in general, control their legal operation, or make them words of purchase; of this the above cited case of *Goodright v. Pullyn* is an instance; and of the same opinion was Lord *Hardwicke*, in the case of *Minshull v. Minshull*, where, upon a devise to *R. M.* and the heirs-male of his body, *and their issues*, he held that *R. M.* took an estate-tail.

Vide 1 Rep.
93. Shelly's
case.

Supra, p. 118.

Minshull v.
Minshull,
1 Atk. 411.

There may, perhaps, be some few cases where the superadded words of limitation may be allowed to control the preceding words *heirs*, *heirs-male*, &c. though in the plural number, when such superadded words limit an estate of a different nature to such *heirs*, *heirs-male*, &c. from that which the ancestor would take, if the preceding words *heirs-male*, &c. in those cases were taken as words of limitation.

As in the case put by *Anderson*, (1 Co. 956.) of a limitation to the use of a man for life, and after his decease to the use of his *heirs*, and the *heirs-females* of their bodies; here the first word *heirs* would have given the fee to the ancestor, if taken as a word of limitation, whereas the subsequent words, *and the heirs-female of their bodies*, grafted on that word *heirs*,
would

And vide
1 Atk. 413.

would give only an estate-tail *female* to the heirs; in these cases the general effect of the first words *heirs of the body, &c.* seems to be altered, abridged, and qualified, by the subsequent express words of limitation annexed to them, and which cannot possibly be satisfied by considering the first words as words of limitation. But we must take care to confine this observation to those cases where the ingrafted words describe an estate descendible in a different course, and to different persons as special heirs, from what the first words would carry the estate to, *viz.* to *males* instead of *females*, or *vice versa*; for where the first words give an estate-tail general, and the words ingrafted thereon are words serving to limit the fee, it seems by the general and better opinion, that the annexed words of limitation are not to be attended to, as may be seen in the above cited cases, of *Goodright v. Pullyn*, and *King v. Burchell*, where the ingrafted words limited the whole fee.

Supra, p. 118.

It is obvious, that there is not the same inconsistency in construing the first words, which describe *heirs special*, to be words of limitation, where the superadded words extend to *heirs general*, as there is where the first words, and those ingrafted on them, distinguish two different incompatible courses of descent, and would not carry the estate to the same persons; in the latter

latter case it is absolutely impossible, by any implied qualification, to reconcile the super-added words to those preceding them, so as to satisfy both by construing the first as words of limitation; whereas in the former case, the super-added words are not contrary to or incompatible with the preceding, but in their general sense include them; and there is no improbability in the supposition that they were used by the testator in the same qualified sense as the preceding; and then both may be satisfied, by taking the first as words of limitation.

We now come to the second class of cases; which are exceptions to the last of the four descriptions of contingent remainders above given. These are grounded upon that respect and attention which (within certain bounds, and where it contravenes no rule of law) is paid to the intent of a testator, wherever it can be collected from any particular expressions in his will. I mean the cases wherein a limitation in a devise to the heir special of a person living has been adjudged a *descriptio personæ*, or sufficient designation of the person for the remainder to vest, notwithstanding the general rule, that *nemo est hæres viventis*. But these cases have been, either, where the limitation to the heir special has been qualified by the words *now living*, or some other circumstances have appeared

peared in the will, to manifest the testator's intention, that the estate should vest. As where *A.* devised land to *J. S.* and his heirs during the life only of *B.* upon trust to permit and suffer *B.* during his life to receive the profits without impeachment of waste, and after the decease of *B.* then to the heirs-male of the body of *B. now living*, and to such other heirs male or female as he after should have of his body; *B.* had issue *C.* a son then living, the court of King's-Bench adjudged that *B.* took a *trust-estate* for life, and that the remainder in tail vested in *C.* immediately, and was not contingent; for that the words *now living* made the limitation a sufficient designation of the person; and this judgment was afterwards affirmed in the House of Lords. A like judgment had before been given in the court of King's-Bench in another case on the same will, on the very same point; which judgment was reversed in the Exchequer-chamber, and that reversal again reversed in the House of Lords, as appears in the reports cited in the margin. It is to be observed, that Chief Justice *Holt* afterwards in the case of *Broughton* and *Langley* denied the case of *Burchett* and *Durdant* to be law, for that the estate for life was executed in *B.* by the statute of uses, and consequently the subsequent limitation gave him an estate-tail.

Again,

2 Vent. 311.
Burchett v.
Durdant.
Vide supra,
114.

1 Vent. 334.
2 Lev. 232.
Raym. 330.
James v
Richardson.

2 Salk. 677.
Vide supra,
116.

Again, where there was a devise to trustees for the term of twenty one years for the payment of debts and legacies, remainder to testator's first son in tail-male, remainder to the heirs-male of testator's body, and for default of such issue to J. S. for ninety-nine years, if he should so long live, remainder to his first and other sons successively in tail-male, remainder to the heirs-male of the body of the testator's aunt E. L. lawfully begotten, and for default of such issue, remainder to testator's right heirs. The testator gave a legacy to his said aunt E. L. thereby taking notice that she was then living, he also took notice of her having three sons, to whom he gave a legacy; he also gave his heir-at-law an annuity out of the lands and legacies to her children. The testator died without issue, and so did J. S. and the question was, whether the eldest son of E. L. (the said E. L. being living at the testator's death) or the heir-at-law of the testator was intitled to the land.

It was insisted on the part of the heir-at-law, that the devise to the heirs-male of the body of E. L. was a contingent remainder, and consequently void, because there was no preceding vested freehold to support it; that it could not operate as a devise to the eldest son by way of *designatio personæ*, he not answering the description of heir-male of the body of his mother at the testator's decease, because *nemo est hæres viventis*. But it was adjudged in the court

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of

1 P. W. 229.
1 Eq. Abr.
214.
Beaumont v.
Long.

of Exchequer, that he was intitled under the devise in question ; for that he was the person designed by the appellation of heir-male of the body of *E. L.*

The court held that though in the strictest legal sense of the word *heir* the eldest son of *E. L.* could not be heir-male of her body during her life, yet the word *heir* had another more general sense, in which it was used for *heir-apparent* ; in which sense it was applicable to him at the time of the testator's decease ; that the testator had taken notice, that his aunt *E. L.* was living, and that she had three sons ; he therefore could not mean, that the eldest son should take strictly as heir, but as heir-apparent he might. Besides, he took notice of his own heir, and gave her an annuity out of the lands ; which shewed his intention, that she should not have all the lands ; and the limitation to his own right heirs was expressly in *default of issue male of the body* of his aunt *E. L.* ; so that it was plain he intended the apparent heir-male of *E. L.* should take before his own heir general, and that his own heir should not take whilst there was any issue of *E. L.* This judgment was afterwards reversed in the Exchequer-chamber, and that reversal again reversed in the House of Lords
(A).

(A). We are to observe however, that there was not one of these cases in which the ancestor took the legal freehold.

Having sufficiently noticed the general exceptions to the literal extent of the four de-

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scriptions

others of the same nature, do not immediately relate to the doctrine of contingent remainders. The question in those cases was not, whether certain circumstances may take a limitation to the *heirs*, &c. out of the general rule that *nemo est hæres viventis*, and occasion the estate to vest in the *heir-apparent*, under such description, as in the cases I have last cited : But the points there agitated respected the extent of the general rule, that a person, in order to take by purchase, under the description of *heir special*, must answer both parts of that description, by being actually heir, as well as that species of heir denoted by the description, according to Lord *Coke's* doctrine, 1 *Inst.* 24. *b.* I have therefore no occasion to introduce those cases here ; but for the satisfaction of those who wish to see a clear and judicious discussion of the principles and doctrine drawn into question, in those cases, I cannot do better, than refer them to the learned and ingenious notes of Mr. *Hargrave*, in the edition he is now publishing of Lord *Coke's* first Institute ; where in note 3. fo. 24. *b.* the doctrine laid down by Lord *Coke*, its principles and distinctions, and the several authorities and cases relative to it, are considered and explained with great accuracy and judgment ; and where the reader is also favoured with a note of Lord *Hardwicke's* opinion, upon his affirming the decree of Lord *Crowper* in the said case of *Newcomen v. Barkham*.

scriptions I have above given of contingent remainders; it may now be proper to explain the distinction betwixt that kind of uncertainty which makes a remainder contingent, and an uncertainty of a different kind which appears to have been sometimes confounded with it; I mean the uncertainty of a remainder's ever taking effect in *possession*; a distinction not always attended to, but absolutely requisite to complete an accurate notion of what is in law considered as a contingent estate. For wherever there is a particular estate, the determination of which does not depend on any uncertain event, and a remainder is thereon absolutely limited to a person *in esse*; in that case, notwithstanding the nature and duration of the estate limited in remainder may be such, as that it may not endure beyond the particular estate, and may therefore never take effect or vest in *possession*, yet it is not a contingent, but a vested remainder. As if a lease be to *A.* for life, remainder to *B.* for life or in tail, here, notwithstanding *B.* may possibly die, or die without issue in the life-time of *A.* and consequently never come into possession, yet is his remainder vested *in interest*, and by no means comprized in the legal notion of a contingent estate.

It is not the uncertainty of ever taking effect in possession, that makes a remainder contingent;

tingent; for to that, every remainder for life or in tail is and must be liable; as the remainder-man may die, or die without issue before the death of the tenant for life. The present *capacity* of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent.

For instance; if there be a lease for life to *A.* remainder to *B.* for life, here the remainder to *B.* although it may possibly never take effect in possession, because *B.* may die before *A.* yet, from the very instant of its limitation, it is *capable* of taking effect in possession, if the possession were to fall by the death of *A.* it is therefore vested in interest, though perhaps the interest so vested, may determine by *B.*'s death, before the possession he waits for may become vacant.

On the other hand, if there be a lease for life to *A.* and after the death of *J. D.* remainder to *B.* in tail; in that case the remainder to *B.* is not *capable* of taking effect in possession during the life of *J. D.* although the possession should fall by the determination of *A.*'s estate: but if *J. D.* chance to die before the determination of the particular estate, then does *B.*'s remainder by such event become *capable* of taking effect
in

in possession when it shall happen to fall, and is then in the same state as if it had been originally limited without any regard to the death of *J. D.* This very essential alteration in the nature of *B.*'s remainder, occasioned by the timely event of *J. D.*'s death, is the change of a contingent, into a vested estate; before that event it had not the *capacity* of vesting in possession, and it was doubtful whether it ever would have it or not; it was therefore not vested at all: by that event it acquires the *capacity* of vesting in *possession*, when the *possession* becomes vacant; it is therefore vested in *interest*, though it is yet uncertain whether it ever will vest in *possession*; for it is still possible, that *B.* may die without issue during the continuance of the particular estate.

In short, upon a careful attention to this subject, we shall find, that wherever the preceding estate is limited, so as to determine on an event which certainly must happen; and the remainder is so limited to a person *in esse*, that the preceding estate may by any means determine before the expiration of the estate limited in remainder; such remainder is vested. On the contrary, wherever the preceding estate (except in the instances before noticed, as exceptions to the descriptions of a contingent remainder) is limited so as to determine on an event which is uncertain, and may never happen; or wherever the remainder is limited to
a person

a person not *in esse*; or wherever it is limited so as to require the concurrence of some dubious, uncertain event, independent of the determination of the preceding estate, and duration of the estate limited in remainder, to give it a capacity of taking effect; then the remainder is contingent.

I am the more particular on this point, from a desire of preventing the errors, which must affect our conclusions upon questions of law concerning this subject, if the uncertainty of taking effect in possession should form any part of our notion of a contingent remainder: such a principle would scarcely fail to mislead us in every case of the least doubt. Suppose a lease be to *A.* for life, the remainder to *B.* during the life of *A.*, and the question to be put, whether this remainder to *B.* be a vested or a contingent interest? Upon the principle last mentioned, this remainder, which would be absolutely void were it not for the possibility of its taking effect by the forfeiture or surrender of *A.*, must necessarily be deemed contingent; because such forfeiture or surrender, upon which its taking effect in possession entirely depends, are doubtful, uncertain events, which probably may never happen. There are instances of this sort of argument at the bar.

Vide infra
Duncomb v.
Duncomb.

Now,

1 Saund. 151.
 3 Lev. 437.
 Duncumb v.
 Duncomb,
 cited infra.

Now, it is very true, such a remainder as I have last instanced, may never take effect in possession: it depends on a dubious uncertain event whether it shall or not, nay the probability is against it; yet, certain it is, there are not wanting cases enough in our books to prove such a remainder to be a vested interest. But this is not the only instance wherein the same principle would lead us into mistakes; it would carry us much farther, and prove many other remainders to be contingent, which have ever been undoubtedly considered as perfectly vested in interest as any remainders whatsoever.

If we examine the same case by the distinctions I have laid down, we shall find it fall clearly under the description of a vested remainder; for here is a preceding estate to determine on an event which certainly must happen, (*viz.* the death of *A.*) and the remainder is so limited to a person *in esse*, that the preceding estate may by some means (*viz.* by forfeiture or surrender) determine before the expiration of the estate limited in remainder, *i. e.* before the expiration of *A.*'s life; accordingly, if *A.*'s life be not expired at the determination of the particular estate, which it will not, if *A.* should commit a forfeiture, or make a surrender, then will the remainder take effect in possession: therefore it comes expressly within the terms of the foregoing description of a vested remainder; and as this conclusion corresponds with
 the

the authorities in point, it may fairly be considered as an instance of the justness of that distinction from which we can thus derive it.

I am very well apprized, that Lord Chief Justice *Lee*, in his argument in the case of *Smith*, on the demise of *Dormer v. Packhurst et al.* as reported by *Viner*, seems to state the same case as an instance of one sort of contingent remainders, in the words following : “ 2dly, “ Where the particular estate may determine “ before the remainder can commence, as an “ estate to *A.* for life, and from and after the “ determination of his estate, then to *B.* during “ the life of *A.* this is good by contingency, “ that is if *A.* forfeit his estate by alienation, or “ otherwise, in his lifetime.” This passage, I observe, is cited *verbatim* in the definition of a contingent remainder, in *Bacon’s Abridgment*. I wish its force had been duly weighed before it had been offered to the reader in that detached form, which must necessarily mislead him.

Bac. Abridg.
vol. iv. p.
306. in the
margin.

The argument at large, as reported by *Viner*, is not always at hand ; the quotation, as it stands detached in *Bacon*, has nothing to control or invalidate its authority : though a small degree of attention to the case will convince us, there is some mistake in the passage I have quoted. To prove this, I shall only cite the following

following passage, which occurs a few lines lower in the same argument : “ As a lease to
 “ *A.* for life, remainder to another during the
 “ life of *A.* this is good, because by possibility
 “ the remainder may take effect, by the tenant’s
 “ for life alienating or committing a forfeiture ;
 “ this possibility is therefore considered as an
 “ interest in the grantor, which he may limit,
 “ and is that sort of interest which the trustees
 “ have for preserving contingent uses, and is not
 “ a mere right of entry, *nor a contingent re-*
 “ *mainder, but a VESTED ESTATE*, to take ef-
 “ fect by those ways and methods of determi-
 “ nation to which the particular estate was sub-
 “ ject when it was created.”

Vin. v. 18.
 fol. 413. pl. 8.
 3 Atk. 135.

This last passage goes directly to the point, and is conclusive : it expressly states the very same case, and affirms, that such remainder is *not a contingent* but a *vested* estate, to prove which several authorities are there cited ; for all which I refer the reader to the argument itself. Agreeable to this idea was the judgment given in that case, so far as it respects the point I am now considering ; which judgment was afterwards affirmed in the House of Lords. It is evident, therefore, the first cited passage must be erroneous, and as such I should have passed it over without notice, had I not apprehended it might have been mistaken for an authority, by those who shall meet with it detached from the case at large.

The

The above cited case of *Smith* on the demise of *Dormer v. Packhurst et al.* was a limitation in remainder (after several preceding estates for life and in tail) to the use of *A.* for 99 years if he should so long live, and from and after the death of *A.* or other sooner determination of the estate limited to him for 99 years, to the use of trustees and their heirs during the life of the said *A.* upon trust to preserve contingent estates, &c. and for that purpose to make entries and bring actions, &c. but to permit the said *A.* to receive the rents and profits, &c. during the term of his life; and after the end or other sooner determination of the said term, to the use of the first and other sons of *A.* successively in tail-male, with divers remainders over. By the expiration of all the preceding estates, *A.* came into possession of the estate limited to him for 99 years; and having a son, he, together with that son, when he came of age, levied a fine of the lands to make a tenant to the *præcipe*, and suffered a recovery of the same, in which the son was vouched. The son died without issue, and afterwards *A.* died without leaving any other son; the next surviving remainder-man made his actual entry within five years, and the question was, Whether the recovery had barred his remainder?

Dormer v.
Packhurst,
Vin. vol. 18.
fol. 418.
3 Atk. 135.

This point depended entirely on another question, Whether the freehold was in the trustees during the life of *A.* or not? For if it
was,

was, the recovery was not well suffered for want of a good tenant to the *præcipe*, and consequently did not bar the remainder; but if the trustees had not the freehold, then it was in the son, and of course he was capable of making a good tenant to the *præcipe*, and the recovery in that case was well suffered; for the court held that the fine by lessee for years (*A.*) or the reversioner (the son) could only operate by way of estoppel, to bar the parties claiming under such lessee or reversioner; but did not acquire the freehold as a feoffment would have done.

To prove that the freehold was not in the trustees, it was insisted, 1st, That the remainder to the trustees was void in its creation, because to commence after *A.*'s death, and then hold during his life, which was repugnant, and could never take effect at all: 2^{dly}, If not void in its creation, it was a contingent remainder, because it was uncertain whether it ever would take effect, as the term of 99 years might not determine in *A.*'s lifetime. 3^{dly}, That if it was neither void nor contingent, yet it did not amount to a legal estate, but was only a right of entry.

But the court resolved that the remainder was not void in its creation, its commencement not being restrained to the death of *A.* but limited from the death of *A.* or other sooner determination

termination of the estate for 99 years, and therefore might take effect by surrender, forfeiture, or effluxion of time, in *A.*'s lifetime. *2dly*, That it was not a contingent remainder, being limited to persons *in esse*, without any condition precedent to be performed, it did not depend on the death of *A.* but on such other events, (*viz.* forfeiture, surrender, &c.) as might determine the particular estate from the nature of the estate itself. *3dly*, That it was not a mere right of entry, but a legal estate, for a grantor cannot reserve a right of entry to a stranger, nor can a right of entry subsist without an estate. Therefore the trustees had the freehold for the life of *A.* And, upon the whole, the court held that the fine and recovery did not bar the remainder. It is to be observed, that this very case, so far as respects the question, whether the remainder to the trustees was contingent or not, falls directly within the distinctions I have above laid down, and is capable of being resolved by them in the same manner and with the same facility as the case I have before instanced.

It frequently happens, that contingent remainders intervene between the particular estate and other limitations over; upon which cases we must observe, that wherever a contingent remainder is limited, which is followed by another limitation over, if the contingent li-
mitation

1 Rep. 137.
Chudleigh's
case.

mitation be not in fee, the subsequent limitation may be vested, if it be made to a person *in esse*. As a feoffment to the use of feoffees during the life of *A.* and after his death, to the use of his first and other sons successively in tail; with several remainders over; and afterwards, *A.* having no sons at the time of the feoffment, it was resolved that all the uses limited to persons not *in esse* were contingent, but the uses to persons *in esse* vested immediately, and that the contingent uses when they should come *in esse*, would vest by interposition, if the estate for life, which ought to support them, was not disturbed.

11 Rep. 80.
LewisBowler's
case, *supra*
28.

Where, in the same conveyance, an estate for life is limited to a person, and after that a contingent remainder to another, followed by a remainder to the heirs or heirs special of the first tenant for life; this last limitation shall be esteemed executed only *sub modo*, that is, in such manner as to open and separate itself from the first estate for life when the contingency happens.

The preceding cases are instances where the contingency of the intervening remainders arose from their being limited to persons not *in esse*. But if there be a remainder limited to a person *in esse*, so as to depend on a contingent event, if the same contingency be not considered

sidered as extending to the subsequent limitations, such of these *limitations* as are to persons *in esse* may be vested; as in the case of *Napper v. Sanders* above cited; where, upon a feoffment made by *A.* to the use of himself for life, and after to the use of the feoffees for 80 years, if *B.* and *C.* his wife should so long live; and if *C.* survived *B.* her husband, then to the use of her for life, and after her decease to the use of *D.* in tail, remainder over; tho' it was agreed that *C.*'s estate for life was contingent, on the event of her surviving her husband, yet it was held that the subsequent remainders were vested.

Vide supra.
P. 12.

And vide
Tracey v.
Lethulier,
infra.

So where lands were conveyed to the use of the grantor for life, remainder to *A.* for life, remainder to his first and other sons in tailmale successively, like remainders to *B.* and to his first and other sons, remainder to *C.* and *D.* (the grantor's sisters) and the heirs of their bodies, reversion to the grantor in fee; after the grantor's death *A.* and *B.* having no sons, and *C.* being dead without issue, *A.* cut down timber-trees and sold them; the heir of the grantor, as then seised of the first estate of inheritance in one moiety of the lands, filed his bill for an account of one moiety of the timber-trees; and though it was objected, that it was more agreeable to equity, that the value of the timber-trees should be put out for the benefit

Whitfield v.
Bewit,
2 P. W. 240.

nefit of the fons of *A.* and *B.* which might be born ; yet Lord *Macclesfield* held, that the heir of the grantor *as seised* of the first estate of inheritance in a moiety at the time of felling the trees, was intitled to a moiety of the timber ; and Lord Chancellor *King* was of the same opinion upon a rehearing.

2 Roll. Abr.
111. Uvedale
v. Uvedale.

Vide infra,
Garth v. Sir
John Hind
Cotton.

1 Salk. 224.
Lord Raym.
208.

So a subsequent contingent remainder may become vested before a preceding one, and the preceding one will be no obstruction to its vesting. As where *A.* was tenant for life, remainder to his first and other fons in tail-male successively, remainder to *B.* for life, remainder to his first and other fons in tail-male ; then *B.* having issue a son, and *A.* no son, *A.* cut timber-trees ; it was adjudged, that the son of *B.* who was then tenant in tail, should have them, for the property thereof was in him by reason of his inheritance, and the remainder to the first and other fons of *A.* is no impediment, being but a possibility which might never happen.—But here it is to be observed, that Chancery will not admit of waste by collusion between tenant for life and the person intitled to the first vested estate of inheritance, to the prejudice of fons not *in esse*.

But where there is a contingent limitation in fee absolutely, no estate limited afterwards can be vested ; as a devise to *A.* for life, without impeachment

peachment of waste, and if he have issue male, then to such issue-male and his heirs for ever, and if he die without issue-male, then to *B.* and his heirs for ever ; in that case the court held that the remainder to *B.* and his heirs was not vested, because the precedent limitation to the issue of *A.* was resolved to be a contingent fee ; and they took the distinction I have stated ; that where the mean estates limited are for life, or in tail, the last remainder may, if it be to a person *in esse*, vest ; but that no remainder after a limitation in fee can be vested.

Loddington
v. Kime.

And vide
Beck's case,
infra.

It seems, however, that a contingent *determinable* fee, devised in trust for some special purposes only, will not prevent a subsequent limitation to one *in esse* from being vested. As where *A.* devised lands to his daughter for life, remainder to trustees to support contingent remainders, remainder to her first and other sons successively in tail ; and if his daughter should depart this life without issue of her body *living at her death*, then he devised the lands to *trustees and their heirs* until his cousin *N.* should attain his age of twenty-one years, upon certain trusts, &c. *Item*, he gave and devised the lands to his cousin *N.* after he should have attained his age of twenty-one years for the term of his life, remainder to trustees to support contingent remainders, remainder to the first and other sons of *N.* suc-

3 Atk. 774.
Tracey v.
Lethulier.

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cessively

cessively in tail, &c. and in default of such issue, or in case *N.* should die before twenty-one and without issue, remainder over. Lord *Hardwicke* held, that the contingency of the daughter's dying without issue living at her death, affected only the estate limited to trustees until *N.* should attain twenty-one; that this limitation to trustees was not an *absolute* fee, as was contended, but a *determinable* fee; that the estate limited to *N.* was only contingent until he should attain twenty-one; and that this contingency extended to none of the subsequent estates, and therefore the remainders over to persons *in esse* were vested.

And here we are to observe, that the above cited cases of *Napper v. Sanders* (in which *C.* died before her husband, and therefore the event on which her remainder for life was to take effect never happened) and *Tracey v. Lethulier*, are two express authorities, that where a remainder is limited even to a person *in esse*, so as to depend on a contingency, this contingency may be considered as confined to such remainder, without extending to or affecting the subsequent limitations; as was held in regard to the contingency of *C.*'s surviving her husband in the case of *Napper v. Sanders*, and in respect to the contingency of the daughter's leaving no issue living at her decease in the case of *Tracey v. Lethulier*.

Some-

Sometimes a contingent estate is devised on a condition annexed to a preceding estate, and that preceding estate never takes effect; in which case it seems agreed, that such subsequent limitation shall nevertheless take place. For that the preceding estate's taking effect, is not considered as a precedent condition. Thus where there was a devise to trustees for eleven years, remainder to the first and other sons of *B.* successively in tail-male, provided they should take the testator's surname, and in case they or their heirs should refuse to take the testator's surname, or die without issue, remainder to the first son of *C.* remainder over. *B.* died without having had any son, *C.* had a son at the time of the devise. The court did not agree as to the validity of the devise to the first son of *B.* being after a term of years without any preceding freehold to support it; but resolved that the subsequent limitation to the first son of *C.* who was then *in esse*, and capable, took effect; and that the preceding limitation to the sons of *B.* or the condition thereto annexed, did not operate as a precedent condition, which must happen to give effect to the subsequent limitation to the son of *C.* but was only a precedent estate attended with such limitations.

Scatterwood
v. Edge.
1 Salk. 229.

Of the same opinion was Lord *Hardwicke* in the case of *Avelyn v. Ward*; who said he knew
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1 Vezey 422.
Avelyn v.
Ward.

of

of no case of a remainder or conditional limitation over, of a real estate, whether the first limitation were by way of a particular estate, so as to leave a proper remainder, or the conditional subsequent limitation, were to defeat an absolute fee before limited, but if the precedent limitation, by what means soever be out of the case, the subsequent limitation should take place. As the said case of *Avelyn v. Ward*, and indeed most of the cases which occur upon this point, are cases wherein the whole fee was first limited, I shall postpone the further consideration of them to the chapter of executory devises; only observing in this place, that if such a conditional limitation is not defeated by the failing of the preceding estate, in those cases wherein the whole estate is first limited; *a fortiori* it should not be defeated, in the cases where the whole fee was not at first limited, but the remainder though conditional; includes the residue of the estate not before otherwise disposed of.

Vide *Avelyn v. Ward*, and *Jones v. Westcomb* infra.

But though where a remainder is devised to take effect on a condition annexed to a preceding estate, and that preceding estate fails, the remainder shall nevertheless take place; yet where such preceding particular estate takes place, and the condition is not performed, the remainder, it has been held, will not take effect, at the expiration of such preceding estate, unless

unless in some particular cases, where it appears to be the general intention of the testator that it should.

For though it has been contended, that, 3 Atk. 285.
where a testator gives a particular estate, and after limits an estate over, upon a contingency, which is to determine the particular estate, sooner than it would otherwise determine; there though the contingency does not happen, nevertheless the limitation over shall be good after the determination of the first estate: yet Lord *Hardwicke* denied there was any such rule; for that all the cases which could be put, depended on particular words, and the intent of the party: and to prove it, cited a case where *A.* devised his estate to his son in tail, remainder to *B.* for life, on condition he should change his name, and if he did not, gave the estate over to *D.*: the son died without issue, *B.* performed the condition and died; and upon a question whether *D.* should have the estate after *B.*'s death; the judges of K. B. were of opinion, that *D.* took no estate on the death of *B.* but it went to the heir at law of *A.*: which opinion was confirmed by the House of Lords in 1729.

Amburst v.
Litton.
in Chanc.
1727.

And Lord *Hardwicke* accordingly in a case where *A.* devised his house, &c. to his wife for life, upon express condition, that if she should marry again, then, that the house, &c. should 3 Atk. 282.
Sheffield v.
Lord Orrery.

should go forthwith to his eldest son and his issue, and if all his issue-male should die, remainder over; held that it was not a vested remainder in the son, but a contingent limitation to take effect only if the wife of the testator should marry again; because, upon the circumstances of that case, the other construction was unnecessary, or rather improper, to effectuate the testator's intent.

Luxford v.
Cheeke.
3 Lev. 125.
Raym. 427.
Brown v.
Cutter.

It is true in a case where *A.* devised his estate to his wife for life, if she should not marry again, but if she did, then, that his son *H.* should presently after his mother's marriage, enter, and enjoy the premises to him and the heirs-male of his body, remainder to testator's other sons successively in like manner, remainder over: the wife survived the testator, and died without marrying again: the question between the heir-general of the testator, and the issue-male of one of the sons, was, whether the condition not having been performed, the remainder to the sons in tail, took effect? The court held that it did; for that by the whole scope of the will, the testator intended an intail, and rather than the intent of the testator should be defeated, the court construed the devise to the wife, to be the same as a limitation to her during widowhood, remainder over, &c. to commence on the determination of the wife's estate, whether by marriage or death.

But

But here we are to remember that a limitation may be so penned, as to take effect either as a conditional limitation in derogation and abridgment of a preceding particular estate, upon the performance of a condition annexed to such preceding estate, or as a remainder expectant upon such preceding particular estate, though the condition be not performed; as appears to have been the fact in the case of *Scatterwood v. Edge* above cited; where, supposing the limitations to the sons of *B.* good, the subsequent limitation to the first son of *C.* was to take effect either upon the sons of *B.* refusing to take the testator's surname, or otherwise upon failure of issue of the sons of *B.* And for another instance of this nature I shall refer to the case of *Brownsword v. Edwards*, cited hereafter in the chapter of executory devises.

And vide
Cro. Jac. 697.
Foy v. Hind.

Vide 2 Vez.
243.

It sometimes happens that a remainder is limited in words which seem to import a contingency, though in fact they mean no more than would have been implied without them, or do not amount to a condition precedent, but only denote the time when the remainder is to vest in possession.

Thus where there was a devise of land to *A.* and *B.* for eight years, and after the said term

3 Rep. 19.
Boraston's
case, and vide
to 1 P. W. 170.

to remain to the testator's executors, till such time as *H.* should accomplish his age of twenty-one years, and when the said *H.* should come to his full age of twenty-one years, then the testator willed that *H.* should enjoy the lands to him and his heirs for ever. *H.* died under twenty-one, and it was contended that the remainder did not vest in *H.*, because he did not live to attain the age of twenty-one years; for that as he was not to have it until his age of twenty-one, it was *contingent* on that event, it being uncertain whether he ever would attain that age. But it was held, that the case was nothing else in effect than a devise to the executor till *H.* attained the age of twenty-one years, remainder to *H.* in fee; and that the adverbs of time *when*, &c. and *then*, &c. do not make any thing necessary to precede the settling of the remainder, any more than in the common case of a lease for life or years, and after the decease of the lessee, or the term ended, remainder to another, in which cases the remainder vests presently. And that these adverbs expressed the time when the remainder to *H.* should take effect *in possession*, and not when it should become *vested*.

Moor 487.
Holcroft's
case.

So where there was an estate given to *A.* for life, and afterwards to his first, second, third and fourth sons in tail, and if his fourth son die without issue, then to *B.* this was held a remainder

der vested in *B.*; and the same thing as if it had been said *remainder to B.* where the fourth son's dying without issue is implied; that it was not a condition, but an expression of the time when the remainder should vest in possession.

So where a testator devised houses to *S.* his son after the death of his wife, and if his three daughters or either of them should over-live their mother and *S.* their brother and his heirs, they to enjoy the same houses for the term of their lives, remainder to *J.* and *W.* After the testator's decease, the son and two of the daughters died without issue, then the mother died, and afterwards the third daughter. One of the questions upon this will was, (after it had been resolved that by *heirs* of *S.* was intended *heirs of his body*) whether this remainder to *J.* and *W.* was contingent upon the event of the daughters surviving their mother and brother; and if so, whether the condition was well performed, two of the daughters having died in their brother's lifetime; but the court resolved that it was not a contingent limitation, but only an expression when the remainder should commence (*i. e.* take effect in possession.)

Cro. Jac. 416.
Webb. v.
Herring.
And vid. Cro.
Eliz. 26.
Lee v. Vincent.

So where a testator devised all his lands to his wife for life, and after her death to his three daughters equally to be divided, and if any

King v.
Runball.
Cro. Jac. 448.

any of them died *before the others*, then the others to be heirs, and if they all died without issue, remainder over; and it was adjudged that they all took *vested* estates tail.

Cro. Jac 695.
Chadock v.
Cowley.

So a devise of *Blackacre* and *Whiteacre* to *M.* for life, and after her death, *Blackacre* to *B.* and his heirs for ever, and *Whiteacre* to *C.* and his heirs for ever; and that the *survivor* of them shall be heir to the other, if either of them die without issue: this it seems is an immediate estate-tail with remainder limited over; for the subsequent clause restrains the first limitation, and the words *if either of them die without issue* mark the time when the remainder over to the other is to take effect in possession; but if it had been, if either of them die without issue, *living the other*, or *before such an age*, the remainder would then have been contingent.

Fortescue v.
Abbot.
Pollex, 479.
Sir Thomas
Jones 79.

Again, where a testator having four children, devised one house to his eldest son and heir, without limiting any estate; and so devised three other houses to his other three children respectively, and willed that if either of his said children should depart this life, then the houses so given them should be equally divided betwixt them *that are living*. The eldest son died, and it was contended that this limitation over to the children then living, was

was a contingent remainder to the survivors, depending on the particular estates for life in the children, and that the eldest son's estate for life in the house devised to him, was merged in the fee which descended on him upon his father's decease; and consequently the contingent remainder to the survivors in this house was thereby destroyed. But, on the other hand, it was insisted and so adjudged by the court, that this was not a *contingent* remainder, but a *vested* remainder; and that every child took a particular estate in his or her house for life, with remainder to the others for their lives *vested*, agreeable to the resolutions in the above cited cases of *Webb v. Herring*, *King v. Rumbal*, and *Chadock v. Cowley*.— It is observable that this case is wrongly reported by *Levinz*, who says he heard that the court held it good as an executory devise. But both *Pollexfen* and Sir *Thomas Jones*, who argued the case, report the decision of the court as above stated.

2 Lev. 202.

So where the testator devised lands to two trustees and the survivor of them and his heirs in trust, to lay out the rents and profits for the maintenance of two nephews of the testator during their minorities; and when and as they should attain their respective ages of twenty-one years, to be and remain to those two nephews and their heirs equally; it was resolved,

Goodtitle v. Whitby,
1 Burr. 228.

solved, that the nephews took the fee immediately, and that the limitation to the trustees was only a chattel-interest out of the freehold in the nephews.

Here I might also introduce, as in some degree connected with the present point, several of the cases where a preceding limitation, or a condition annexed thereto, has been held not to be a condition precedent to give effect to a subsequent limitation; but these cases I have either *noticed* already, or referred the consideration of them to a subsequent part of this treatise.

Vide supra
p. 163—4.

Some instances are to be met with, where the contingency, upon which an estate is limited has been considered as a condition subsequent instead of precedent; so that the estate becomes vested immediately, subject to be defeated by the condition when it happens, in the room of not taking effect till such condition happens. Thus, where a fine was levied to the use of *A.* and his heirs, if *B.* should not pay 10 s. to *A.* before a certain day, and if he should, then to the use of *A.* for life, remainder to the use of *B.* in fee; the condition in this case was held a condition subsequent with respect to *A.* so that he took an estate in fee until *B.* paid the 10 s. Here it was evidently the intent that one of the limitations should

1 Roll. Abr.
415. pl. 12.
Spring v.
Caesar.

should take effect immediately; the latter could not take place till the 10*s.* paid, therefore it must be the first.

So where there was a surrender to the use of the surrenderor for life, and after to the use of the youngest son, and the heirs of his body, if he attained the age of eighteen, and if he died before eighteen without issue-male, then to the right heirs of *A.* it was held to be a condition subsequent with respect to the youngest son; and therefore the remainder vested immediately, subject to be defeated by the condition of his dying without issue-male before he attained the age of eighteen. Here it was evidently the intent, that the estate should not go to the heirs of *A.* if the youngest son died before eighteen leaving issue male; but if the estate was not to vest till he attained eighteen, this intent could not have been satisfied. Constructions of this sort, however, seem to be only allowable where the limitations are by way of use, or by will, as they really are nothing but shifting uses or executory devises, of which *vide* hereafter.

2 Show. 398.
Stocker v.
Edwards.
Vide also 3.
Lev. 132.
Edwards v.
Hammond,
where the
same case
seems to be
somewhat
differently
stated.

And vide
Avelyn v.
Ward, 1 Ver.
420.

Of the Nature of the Contingency upon which a Remainder may be limited.

IN the limitation of contingent remainders, it is necessary that regard be paid to the nature of the contingency upon which the remainder is intended to take effect; for the limitation intended as a contingent remainder may fail of effect, on account of the following circumstances, respecting the contingency upon which it is limited to take effect.

1st, The contingent event's being an illegal act.

2^{dly}, The remote probability of the contingent event.

3^{dly}, The condition's enuring to defeat the preceding estate.

This third or last objection may again be subdivided into two branches; the first relating to those cases where the condition upon which the subsequent limitation is intended to arise or take effect, is repugnant to any rule of law, or contrariant in itself,

or

or inconsistent with the quality or nature of the preceding estate; the second extending to all other cases where such repugnancy, contrariety or inconsistency is out of the question; but the condition merely operates to defeat and abridge the preceding estate.

The first two of the three general grounds of objection above noticed, extend to those limitations which (so far as respects their relation to the preceding estate) fall within the proper description of remainders. But the third or last objection renders all limitations to which it applies ineffectual as remainders, (because a remainder, properly so called, cannot enure to defeat or abridge the preceding estate) and as to such limitations as fall within the first branch of the objection, they are intirely void; whilst many of those to which only the latter branch of this objection is applicable, may take effect as shifting uses, or as executory devises, though void as remainders in the strict sense of that word.

To begin with the first objection, Lord Coke 2 Rep. 51.
Plow. 32. tells us, the law will never adjudge a grant, by reason of a possibility or expectation of a thing which is against law, for the same is *potentia remotissima*, and which by intendment of law *nunquam venit in actum*; of this nature was the possibility of a man's entering into religion
by

by becoming professed. Upon the same principle, a limitation to a bastard not *in esse* is held to be void; for the law does not favour such generation, or expect that such should be.

Cro. El. 509.

As to the second point, it is requisite that the possibility upon which a remainder is to depend, should be a common possibility and *potentia propinqua*, as death, or death without issue, or coverture, or the like. Therefore a remainder to a corporation, which is not in being at the time of the limitation, is void, although it be erected during the particular estate. But if during the vacation of the mayoralty of *D.* a lease for life be made, remainder to the mayor and commonalty of *D.* this remainder is good if there be a mayor of *D.* elected during the estate for life.

2 Rep. 51.

1 Inst. 264 a.

So if there be a lease for life, remainder to the heirs of *J. S.* though this remainder be good, because by common possibility *J. S.* may die during the particular estate, yet if there be no such person as *J. S.* at the time of the limitation, notwithstanding such a person should afterwards be born, and die during the life of the tenant for life, his heir shall not take by virtue of such limitation; because the possibility on which it is to take effect is too remote; for it amounts to the concurrence of two several contingencies, not independent and

2 Rep. 51.

and collateral, but the one requiring the previous existence of the other, and yet not necessarily arising out of it, *viz.* *First*, That such a person as *J. S.* should be born, which is very uncertain, and *Secondly*, That he should also die during the particular estate, which is another uncertainty grafted upon the former; this is called a possibility upon a possibility, *1 Inst. 25. b.* which Lord *Coke* tells us is never admitted by *184. a.* intendment of law.

Upon the same ground ariseth the distinction between a remainder limited by a general description, and one limited by a particular name to a person *not in esse*. In the first case the remainder is good, as a limitation to the right heirs of *J. D.* who is alive, or *primogenito filio* of *B.* who has no son then born; but in the other case the remainder is void; as if a remainder be limited to *G.* son of *D.* in that case if *D.* hath not a son named *G.* at the time of the limitation, the law will not expect he should afterwards have a son so named, because it amounts to a possibility upon a possibility, *viz.* first, that he should have a son, and secondly, that such son should be named *G.* *2 Rep. 51.*

In regard to the third objection, to begin with the first branch of it, *viz.* the repug-

N

nancy,

Vide 1 Rep.
86. b.
6 Rep. 40. b.

nancy, contrariety or inconsistency of the condition. It has been held, that a condition or limitation must determine or avoid the whole of the estate to which it is annexed, and not determine it in part only, and leave it good for the residue. Upon this principle it has been adjudged, that a proviso to make the estate of tenant in tail cease *during his life*, is void; for that although the whole estate may be determined by a condition, yet part of it only, *viz.* during the life of tenant in tail shall not; here we see the proviso is ineffectual, on account of its repugnancy to a rule of law.

1 Rep. 86. a.

Again, it may be contrariant in itself, as in the case of a proviso for determining an estate-tail, *as if tenant in tail were dead*; this has been held a contrariant proviso, and void on that account; because the death of tenant in tail does not determine the estate-tail, but his *death without issue*; and consequently to say that the estate-tail shall determine, *as if he were dead*, amounts to saying that it shall determine, as it would do upon an event (*viz.* death of tenant in tail) which event might *not* determine it; and therefore such a proviso is contradictory and absurd in itself. I shall now adduce two or three leading cases, wherein the proviso was held void on both these last mentioned grounds.

Thus

Thus where C. covenanted to stand seised of lands to the use of himself for life, remainder to the use of R. and the heirs-male of his body, with divers remainders over. PROVIDED, *That if R. or any of the heirs-male of his body should attempt or procure any act or thing, by which any estate-tail so limited should be undone, barred or determined, &c. that then after that, &c. the uses and estates to him limited who should so do, &c. should cease, only in respect to such person so attempting, in the same manner as if such person so attempting, &c. were naturally dead; and that then immediately in all such cases, the uses of such lands should be to such persons to whom the uses should come, if such persons so attempting, &c. were naturally dead, of such and the like estate, and in the same manner and form, and with such remainders over, and under such limitations and restrictions, &c. as if such person so attempting, &c. were naturally dead.*

Corbet's case,
1 Rep. 83. b.

Afterwards C. died and R. suffered a common recovery to his own use, &c. The next in remainder immediately thereupon entered; and upon the question, whether such entry was lawful or not? That justices of the C. P. unanimously agreed, that this proviso to cease an estate limited to one and the heirs-male of his body, *as if the tenant in tail were dead*, was repugnant impossible and against the law.

For the *death of tenant in tail*, is not a cesser of the estate-tail, but the death of tenant in tail *without issue* of his body is the determination thereof, &c.

Jermyn v.
Arscot, cited
1 Rep. 85.

And in *Corbet's* case, two other similar cases were cited by the court; the one upon a will, where after several limitations in tail, a proviso of the like nature was inserted. One of the devisees in tail levied a fine, whereupon the next in remainder claimed the lands by force of the proviso; and upon solemn argument it was adjudged, that the proviso of restraint was void, because it was against law and repugnant; for by a proviso, condition or limitation, the whole estate ought to be defeated; and that it cannot determine the estate for part, and continue it for the residue; and that an estate in land cannot cease for a time and revive and re-vest afterwards; and that a proviso to cease an estate-tail, *as if tenant in tail were dead*, is repugnant, because the estate-tail is not determinable on his death, but on his *death without issue*. The other was a case arising upon a conveyance to uses, whereby the lands were limited to the use of *H.* and the heirs male of his body, with divers remainders over. PROVIDED, That if *H.* or any of the heirs of his body should attempt or make any feoffment, &c. that his estate should

Cholmley v.
Humble, cit.
1 Rep. 86.

should cease as if he were dead. And the feoffees and their heirs should stand seised of the lands to the use of such person to whom the same ought to descend or remain according to the limitations. *H.* levied a fine, and upon the question whether the next remainder-man became thereupon intitled to the lands, it was held that a proviso to determine an estate-tail *as if tenant in tail were dead*, was against law and repugnant; and that a condition or limitation ought to destroy all the estate to which it is annexed, and not part of it only.

Again, where there was a limitation in tail, with a proviso, that if the tenant in tail should advisedly and effectually attempt, procure and go about, or assent or do any act, &c. touching any bargain, sale, discontinuance, alteration, &c. of the lands, whereby any estate, &c. might be discontinued, &c. that then from the time of such procuring, attempting, &c. his estate should cease as if he were dead; it was held, that the words *attempt, go about, &c.* were uncertain and void in law; that inheritances ought not to depend on such uncertainties, for that the law doth reject conations and goings about as things uncertain, which cannot be put in issue.

6 Rep. 40.
Mildmay's
case.

And

Foy v.
Hynde,
Cro. Jac. 697.

And so in another case, where there was a limitation over, upon tenant in tail or his issue effectually and expressly assenting, concluding, doing and going about to do, or make any act or acts to alter, discontinue or change the estate &c. and tenant in tail levied a fine by agreement. The court said here was no limitation to enter, but after the effectual going about, and it was not effectual till after the act done; and when the act was done, the remainder was discontinued. And it was held, that these words were too ambiguous to determine an inheritance by limitation.

6 Rep. 41.
10 Rep. 38.
b. vide 2
Vern. 233.
635.

We are further to observe, that there are certain incidents and qualities so annexed to and inherent in certain estates, as to be incapable of being restrained or prohibited by any proviso, condition or limitation; and therefore where an estate is limited to take effect upon any such restrictive condition annexed to a preceding estate, such limitation is held to be void and incapable of taking effect at all. I shall instance this in the case of an estate-tail, to which the power of suffering a common recovery, and of levying a fine (within *Statute 4 H. 7. and 32 H. 8.*) is so incident and inherent, that any condition or proviso restraining or prohibiting it, is held to be repugnant to the nature of the estate, and therefore void.

As

As where lands were devised to several daughters successively in tail, with a proviso that if any of them should conclude and agree to or for the doing or execution of any act, &c. whereby the lands intailed, &c. or any estate or remainder thereof should by any way or means be discontinued or aliened, or should do any act or thing whereby the lands might not descend, remain or come as limited by the will, that then the person so concluding and agreeing to or for the doing and execution of any such act, &c. should immediately after such conclusion and agreement, &c. lose and forfeit, &c. such estate and benefit as she and they might claim, in such manner as if she or they had never been named in the will, and thenceforth the estate and estates limited to her or them, &c. should utterly cease, as fully to all intents and purposes as if she or they, &c. were *dead without heirs of their bodies*. The first tenant in tail concluded and agreed to suffer a common recovery, and suffered one accordingly; the next in remainder claimed the estate as forfeited; and contended, that if the donor could not restrain the recovery after it was suffered, because thereby the remainder was barred, yet he might restrain the conclusion and agreement to suffer it, to prevent the bar by the recovery.

Mary Portington's case,
10 Rep. 37.b.

But

And vide
9 Rep. 128.
Sunday's case.

But it was adjudged in that case, that tenant in tail cannot be restrained by any condition or limitation from suffering a recovery; and that it was absurd to say that the recovery itself cannot be prohibited by any condition or limitation; and yet that the conclusion or agreement to suffer it may be prohibited; and it was also laid down in the arguments in the same case, that the levying a fine within *Stat. 4 H. 7. c. 24.* and *32 H. 8. c. 36.* to bar the issue, was of the number of those incidents to an estate-tail, which could not be restrained by condition.

Scholastica's
case, Plowd.
403. or
Newis v.
Lark,

And though *Scholastica's* case (where tenant in tail, under a proviso of this nature, levied a fine and suffered a recovery, and it was held by the court, to have determined the estate-tail by limitation, and have given title of entry to the next in remainder, the point respecting the invalidity of restraining a recovery being not at all moved in the arguments upon the case) was cited in *Mary Portington's* case, as an authority in support of the validity of the restriction, yet it was observed, that the tenant in tail in *Scholastica's* case first levied a fine, which, for any thing that appeared, was a fine at the common law; and then it was a discontinuance and wrong, and therefore might be restrained by condition. And, besides,

besides, that it was afterwards in the King's Bench by *Popham C. J.* and two other justices, for the matter in law, resolved in *Scholastica's* case against the former opinion, though the judgment was given upon an incurable imperfection in the verdict.

Vide Cro.
Eliz. 437.
Bateman v.
Allen.

The distinction between the preceding cases of *Corbet*, of *Jermyn v. Arscot*, of *Cholmley v. Humble* and of *Mildmay*, and that of *Mary Portington*, is to be attended to; in the four former the proviso was repugnant to a rule of law, as being confined to the avoiding only part of the estate-tail, viz. so far only as respected tenant in tail himself, still leaving it good as to his issue, and also involved something contradictory and absurd in itself, being to determine the estate-tail, as if *tenant in tail were dead*; which, in fact, does not determine the estate-tail. Whereas the case of *Mary Portington* steered clear of these objections; the proviso there enuring to defeat the whole estate-tail, and to determine the estate-tail as if tenant in tail were dead *without heirs of his body*, which really is a determination of the estate-tail. The question, therefore, in this last case did not respect the general validity of the proviso, but only the extent or application of it to a particular act, viz. the suffering a recovery; and we see it was determined that the restriction was void.

as to that, and would have been equally so as to a fine levied pursuant to the statutes of H. 7. and H. 8.

But, however, such a proviso or limitation as that in *Mary Portington's* case, it seems, may extend to restrain a feoffment, or even a fine at common law, or any other tortious discontinuance or alienation; and a breach of it by any such tortious alienation, may give effect to the limitation over, and a title of entry to the person claiming by force of it. This was admitted in the arguments in *Mary Portington's* case.

Peirce v.
Win,
1 Ventr. 321.

Thus where a devise was to one and the heirs-male of his body, with a proviso, that if he attempted to alien, then immediately his estate should cease, and another should enter; the devisee made a feoffment, and though it was held that the condition, viz. *to attempt to alien* was void, for that a man cannot be restrained from an attempt to alien, for *non constat*, what shall be judged an attempt, and how it can be tried; yet it was agreed on all hands, that tenant in tail might be restrained from aliening by feoffment or other act which was tortious, and would make a discontinuance, though he could not be restrained from aliening by fine or recovery.

Vide Co. Lit.
224. b.

And,

And, indeed, in a former case where lands were given in tail upon condition that if the donee or his heirs discontinued, the donor should enter; the donee had issue two daughters and died; the daughters had issue two sons and died; one of the sons discontinued, and it was held to be a forfeiture. *Leonard*, in his report of this case says, the discontinuance was by fine, and so it might be, agreeable to the observation made in *Mary Portington's* case in regard to the fine in *Scholastica's* case, if we suppose it to have been a fine at common law.

Croker v.
Trevithen.
Cro. Eliz. 35.
1 *Leon.* 292.

And so where lands were devised part to testator's eldest son in tail, part to his youngest son in fee, provided that neither of the said sons should sell or lease the lands so given them, or do any act, &c. before they came to the age of thirty years. And if either of them did, then the other should have the portion so devised to his brother. The eldest son leased the lands devised to him before he attained that age; and it was held that the entry of the youngest son upon him was lawful.

Spittle v.
Davis.
2 *Leon.* 38.
Moor 271.

But all these last mentioned cases, where the condition is not void, fall within the latter branch of the third objection above noticed; being of that class, where as the condition enures to defeat the preceding estate, the subsequent

sequent limitation cannot operate as a remainder in the strict and proper sense of that word, though it may still take effect as a conditional limitation by devise, or by way of future or springing use.

Now to come to the latter branch of the third and last above noticed ground of objection, we are to observe, that it is laid down as a rule in conveyances at common law, that every remainder must be so limited as to wait for the determination of the particular estate, before it is to take effect in possession; and not to take effect in prejudice or exclusion of the preceding estate. This rule not only flows of necessity from the definition of a remainder, which I have considered in the beginning of this essay; but also follows as the consequence of a maxim at common law, that none shall take advantage of a condition but the party from whom the condition moves (*i. e.* the grantor) and his heirs; now if he or his heirs take advantage of a condition by entry or claim; the livery made upon the creation of the estates is defeated, and of course every estate then created is thereby annulled and gone. But the remainder ought to vest at the instant of the expiration of the preceding estate; and at that instant we see both preceding estate and remainder are defeated by the entry of the grantor. Therefore such

Plowd. Com.
24. b.

Vide Dr. and
Stud. lib. 2.
cap. 21.

Perk. f. 831.
1 Inst. 214.

re-

remainder is void. It follows that a remainder, properly so called, cannot be limited to take effect upon a condition which is to defeat the particular estate, whether such condition be repugnant to the nature of the estate to which it is annexed, or not.

Thus, for instance; if a lease for life be made upon condition, that if a stranger pay to the lessor 20*l.* then *immediately* the land shall remain to the same stranger, this remainder is void; for the tenant for life ought to have it during his life, and if so, during that time the stranger cannot have it; for he can take no advantage of the condition, but only the grantor or his heirs; but had it been limited, that if a stranger pay to the lessor 20*l.* then, *after the death of tenant for life*, it should remain to that stranger, it would have been a good remainder.—The distinction between the two cases is this; in the latter the remainder is not to vest in possession till after the determination of the estate for life, when it may vest of course: in the former it is limited to take effect in possession on the performance of a condition, which is to defeat the estate for life, and not to wait till the particular estate be determined, which *ex vi termini* every remainder ought to do.

Plowd. Com.
29. b.

So if a lease be made to two, the remainder over in fee after the death of *the first of them*, this remainder

Plowd. 24.

remainder is void ; because the survivor must have the lands during his life by the nature of the first estate, otherwise the first estate would be defeated as to such survivor.

Plowd. 32. in
the case of
Colthurst v.
Befushin.

But, however, here we are to observe, that if land be leased to one for life, &c. and if such a thing happen, *then* to remain to *B.* &c. this shall not be understood as intended to vest in possession, immediately upon the happening of the condition, and in abridgment of the preceding estate ; because under that construction the remainder would be void for the reasons already given ; but it shall be construed to vest in interest upon the happening of the condition, and to remain as a remainder ought to do, that is so as to wait the determination of the preceding estate before it comes into possession.

Vide supra,
p. 168.

As if a gift in tail be made to one upon condition that if he do such an act, then the lands shall remain to his right heirs ; the word *then* is not so to be understood, as to avoid the estate-tail, and execute the fee-simple in possession immediately on performance of the act, but must be taken in this manner, *viz.* that upon performance of the act, the remainder in fee shall vest in him, not to be executed in possession till the expiration of the estate-tail.
——So if there be an estate to husband and wife

wife for their lives, remainder to *B.*, and if *B.* die before the husband and wife, then to remain to *C.*; this would be a good remainder to *C.* to take effect in possession after the determination of the preceding estate; but it would have been void if it had been, that then *from the death of B.*, *C.* should have the lands during the lives of husband and wife, upon the principles before laid down.

The same law holds with regard to a subsequent estate limited to take effect on a condition which is to defeat a preceding remainder; as where *A.* seised in fee let to *B.* for life, remainder to *C.* for life, provided that if *A.* should have a son which should live to the age of five years, the estate limited to *C.* should cease, and the land remain to that son in tail; it was adjudged, the estate limited to the son was void, because limited on a condition which was to defeat the preceding remainder to *C.*

But here we are to distinguish between the cases, where a subsequent estate is limited to take effect upon a condition which is to defeat the preceding estate; and other cases where the preceding estate is limited, subject to a condition, but the remainder is limited without any relation to or dependence at all upon that condition. In the first cases we have seen the condition

Cro. Eliz.
360.
Cogan v.
Cogan.

1 Roll. Abr.
Cond. 1.
d. pl. 3.
pl. 4. P. d.
pl. 2. pl. 9.
Brook Cond.
pl. 111.
Bac. Abr. 4.
319.

condition makes the subsequent limitation void ; but in the latter it seems the remainder destroys the condition : as if a man lease to A. for life upon condition, remainder over, *Roll* says the condition is destroyed.

Now in these cases, though the remainder is not intended to be affected by the condition annexed to the particular estate, yet if that condition were good, the grantor's entry for breach of it, would defeat the remainder, upon the principles before laid down. But it is unreasonable that the grantor should defeat that estate in remainder which he had absolutely granted away. Indeed it seems directly within the reason of the case put by *Littleton*, that if a man lease for life upon condition of re-entry for default of payment of rent, and the lessor afterwards grants his reversion, the lessor or his heirs cannot enter, because he hath aliened the reversion : so in the above case the lessor by limiting the remainder over absolutely, hath departed with the reversion as much as if he had afterwards aliened it by another conveyance.

Lit. f. 347.
Vide Perk.
p. 831.

I have not met with any case determined expressly upon this point, where the limitation was by conveyance at common law ; and where the limitation was by devise, there seems formerly

merly to have been some difference in our books. Some took a distinction upon this principle; that though in the case of a conveyance at common law, the entry for condition broken must defeat the livery, and of course the remainder which took effect from it; and therefore the remainder in that case when limited without dependence on the condition, should be construed to destroy the condition annexed to the preceding estate: yet that in case of a devise, where the estates took effect without livery, there was not the same reason that the entry for the condition broken should destroy the remainder; but that such entry might in that case affect only the particular estate, and the remainder nevertheless take place at the time limited for it to commence; and therefore the remainder need not absolutely destroy the condition, but that the heir should enter for breach of the condition, and retain only till the remainder should take place: whilst others considered the condition in the case of a devise absolutely destroyed by the remainder over, no less than in the case of conveyance at common law.

Perk. f. 563.
Dyer 127.

Plow. 412.
10 Co. 41.

As where a testator, having issue three sons, devised lands to his wife for her life *sub conditione quod ipsa educabit pueros testatoris in bonis moribus*, the remainder to the second son in tail,

Dyer 127.
10 Rep. 41. b.
Dr. Butt's
case.

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and

and the reversion descended to his eldest son. The condition was broken: the question was, whether the heir should enter for the condition, or the son in remainder should enter as for breach of a limitation, or the condition be destroyed by the limitation over. And the court resolved that it was not a limitation, because there were express words of condition, and the meaning of the testator was, that his heir, who always is to take advantage of a condition, should enter and defeat the estate of the wife; but his meaning did not accord with the law, for he could not defeat the estate for life without defeating the remainder, and therefore by the limitation of the remainder over the condition was destroyed.

But whatever differences of opinion formerly existed in regard to this matter, they are now no more; for that question has long since ceased, and it is now agreed, that wherever in a devise a condition is annexed to a preceding estate, that condition shall operate as a limitation, circumscribing the continuance and measure of the first estate; and that upon the breach or performance of it (as the case may be) the first estate shall *ipso facto* determine and expire, without entry or claim; and the limitation over shall thereupon actually commence in possession, and the person claiming under it, whether heir or stranger, shall have immediate right

Vide Plowd.
408. Scholastica's case and
3 Rep. 20. b.
21. a. Wellock v. Hammond.

right to the estate. Thus indeed is the testator's intention effectuated, by substantiating the remainder, though limited to a stranger; and enforcing the performance of the condition, by the determination of the particular estate upon the breach of it, notwithstanding that particular estate be limited to the heir himself.

As, where one devised lands to his mother for life, and after her death to his brother in fee, provided that if his wife (being then *enfeint*) be delivered of a son, that then the land should remain to him in fee; the testator died, a son was born, and it was held that the fee of the brother should cease, and vest in the son upon the happening of the contingency.

Dyer 127.
in margine.

—Again, where *A.* devised lands to his wife for life, and after her death to his grandchild *B.* and the heirs of her body; *provided always and upon condition* that she married with the consent of *D. E.* and *F.* or the major part of them; and in case she should marry without such consent, or die without issue, then he devised the premisses to *C.* (neither *B.* nor *C.* being heir at law to the testator.) After the testator's death *B.* married without the consent of any of the persons named for that purpose; and it was clearly held to be an estate to *B.* till she married without such consent; that here was an estate-tail devised to *B.* subject to

1 Ventr. 199.
Lady Anne
Fry's case.

two limitations, the one in law, *viz.* dying without issue, the other express, and in fact, *viz.* marrying without consent, which was properly a conditional limitation, and not a condition; for if it were a condition, it would descend to the heir at law, and he might enter for breach of it, and defeat the limitation over; and it was therefore agreed that the marriage without consent determined her estate-tail, and cast the possession immediately on C.

2 Mod. 7.

So where one devised lands to *A.* his heir at law, and other lands to *B.* in fee, and that if *A.* molested *B.* by suit or otherwise, he should lose what was devised to him, and it should go to *B.* After the testator's death *A.* entered on the lands devised to *B.* and claimed them; and it was held that this was a sufficient breach to give title to *B.* and that the condition imposed on the heir should not be taken as a condition; because, if so, by descending on him who alone could enter for the breach of it, it would in this case be fruitless and defeated: but it was held to be a limitation which determined the heir's estate, and cast the possession on *B.* without entry.

Therefore when it is said that a subsequent estate limited on a condition which is to defeat a preceding estate is void, the rule must be understood

understood only of estates limited in conveyances at common law ; for that such a limitation over may be good by way of devise, is clear from the cases last cited, and will further appear in the chapter of Executory Devises, to which these sort of limitations, in those cases where the whole fee is first devised to a person *in esse* are to be referred ; and limitations of this nature may also take effect by way of use for a use may be limited to cease as to one person upon a future event, and to vest in another.

Vide Spring
v. Cæsar.
Supra, p. 172.
& Dyer 314.
pl. 96 Moor
99. pl. 243.
and Le

As if a man make a feoffment in fee to the use of *W.* and his heirs till *A.* pay 40 *l.* to the said *W.* and then to the use of the said *A.* and his heirs, and the statute executes the estate in *W.* and afterwards *A.* pays the 40 *l.* there *A.* is seised in fee if he enters, by the opinion of several ; but by some, *A.* shall not be seised in fee by the said payment, unless the feoffees enter ; therefore it seems to be the surest way to enter in the name of the feoffees and his own name ; and therefore it appears that a man at this day make a feoffment to uses, and that the use shall change from one to another by act *ex post facto*, by circumstance, as well as it would before the statute 27 *H.* 8. of uses : these are the words of *Brook* in the place I have cited.

Brook Feoff-
al' Uses, pl.
30.

So

Leon. 25.
pl. 31.
Benicombe v.
Parker.

So where *A.* tenant in tail by indenture bargained and sold the lands to the use of *J. S.* in fee, in the indenture was a letter of attorney to make livery, which was made accordingly; *J. S.* by the same indenture covenanted, that if *A.* before such a day paid 40*s.* that then *J. S.* and his heirs should stand seised, &c. to the use of *A.* and his heirs, and if *A.* did not pay, &c. then if the said *J. S.* did not pay to the said *A.* within four days after 10*l.* that *J. S.* and his heirs should henceforth be seised to the use of the said *A.* and his heirs, &c. and *A.* covenanted for further assurance; both failed of payment; *B.* levied a fine to *J. S.* without any consideration. It was adjudged a good feoffment well executed by the livery, notwithstanding the words of bargain and sale only, and that the covenant to be seised to the new uses conditionally upon the payment and non-payment, being in one and the same deed, should raise the use upon the contingency according to the limitation of it.

Cro. Eliz.
439
Woodliff v.
Drury.

So where one made a feoffment, to the use of himself and *A.* his feme *that should be* after their marriage, and the heirs of their bodies, and he took *A.* in marriage; all the judges held, that although he were seised in fee in the mean time, yet, by the marriage, the new use should arise and vest, if there were no act in the mean time to destroy that future use, (as
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it was in *Chudleigh's* case) and judgment was given accordingly.

So where *A.* and *B.* two sisters, in consideration of 4000*l.* paid to *A.* by *C.* conveyed lands by lease and release to the use of *B.* and *C.* for their lives (upon their intended inter-marriage) remainder to their first and other sons in tail-male successively, remainder to the daughters of *B.* and *C.* in tail, remainder to the right heirs of *C.* Provided, that if there should be no issue of *B.* and *C.* living at the decease of the survivor of them, and that the heirs of *B.* should within twelve months after the death of *B.* and *C.* dying without issue as aforesaid, pay to the heirs or assigns of *C.* 4000*l.* then the remainder in fee so limited to *C.* should cease, and the lands should remain to the right heirs of *B.* for ever. Afterwards *B.* and *C.* for extinguishing all right and title of *B.* and her heirs under this proviso, levied a fine of the lands to the use of *C.* and his heirs. *B.* and *C.* died without issue, and the heir of *B.* filed a bill against the heir of *C.* to have a conveyance of the lands upon payment of the 4000*l.* pursuant to the proviso. The bill was dismissed; but upon an appeal brought in Parliament, the decree of dismissal was reversed, upon its being alledged that the proviso was not void, it being within the reason of the limitations

Loyd v. Carew, Prec. in Chanc. 72.
Show. Cases in Parl. 137.

Vide infra. mitations allowed in the Duke of *Norfolk's* case, where it is said that future interests, springing trusts, or trusts executory, and remainders that are to arise upon contingencies are quite out of the rule and reason of perpetuities, if they are not of remote consideration, but such as will speedily wear out. And that the fine could not bar the proviso, because the same land never was nor *could be* in *B.* who levied it.

And vide
Smith v.
Warren, Cro.
Eliz. 638.

The uses I have been speaking of are called shifting or secondary uses, and are allowed, (within the limits established for avoiding perpetuities) because they were good before the statute 27 *Hen.* 8. of uses, (when uses were fiduciary, and totally distinct from the legal estate, which at common law could not be limited in such manner,) and do not fall within any of the mischiefs which that statute was made to remedy. It appears, however, to have been a question, whether limitations of this nature were good in surrenders of copyhold estates. Thus where there was a remainder *habendum* from the death of the surrenderor to the use of his child then *in ventre sa mere* and his heirs and assigns for ever, and if the child died before age or marriage, then to the use of *J. S.* and his heirs and assigns. *Croke* says it was resolved that the surrender to the use of *J. S.* was void, for that a man could not make a conditional surrender to operate in future.

Sympton v.
Sothern.

Cro. Jac. 376.

On

On the other hand, the same case as reported by *Rolls*, is cited in *Lex Customaria* as an authority that such future uses are good, and that a fee may be limited on a fee upon a contingency in copyhold estates. But in *Gilbert's Tenures* it is said, that such a resolution seems not to be grounded on so good reason as the contrary resolution in *Croke*; for the use upon a surrender of a copyhold is not like a use or trust at common law: but he who is admitted upon a surrender, is admitted to the legal *customary* estate, and is not seised to a use; therefore uses upon surrenders are in general governed entirely by the same rules, as conveyances at common law, in which such limitations were not allowable; and that upon this principle it seems a fee upon a fee in case of a surrender of copyholds is not good, any more than in a conveyance at common law. However, the contrary appears to have been admitted and holden in the above cited case of *Stocker v. Edwards*, or *Edwards v. Hammond*.

Lex Cust. 121.
1 Roll. Rep.
109. 138.
252.
2 Roll. Abr.
791. P. pl. 2.
Gilb. Ten.
244.

Vide *supra*,
p. 173.
And vide
3 Rep. 20. b.
Wellock v.
Hammond.

But there are also some instances of freehold estates, wherein this sort of uses has not been admitted to take effect; as where a feoffment was to the use of *A.* for life, remainder to his wife for life, remainder to his right heirs, with a proviso that if his son interrupted his wife it should be to the use of his wife and

Lea v. Burton.
Moor 742.
pl. 1022.
Law of Uses,
138.

and her heirs; *A.* made a lease for years to commence after the death of his wife, and died, the son disturbed the wife, and it was resolved that the uses would not arise to give the wife the fee. The reason of this case seems doubtful and obscure; however, the lease for years made to commence after the death of the wife, is said to have been the occasion of the judgment, for that the reversion after the death of the wife being altered by that lease, the same use in the reversion which was in being at the disposition of the particular estate, and so conditionally limited to the wife, could not arise to her, and that therefore the use could never arise at all.

Moor 633.
pl. 868.

So if a limitation be to the use of *A.* and his heirs, provided that if he give a mortal blow to any person, that the use shall cease to him, and shall be to another; this is fraudulent to prevent an escheat, and therefore is void.

Moor 761.
pl. 1054.
Holloway v.
Pollard.

And where *A.* bargained and sold land to *B.* for 500 *l.* upon condition that if *A.* paid *B.* 500 *l.* he might re-enter, and be seised to the use of himself and his heirs, until he should attempt to alien without the assent of *B.* and then to the use of *B.* and his heirs; and a fine was levied to those uses; *A.* paid the 500 *l.* and entered, afterwards *A.* aliened without

out the assent of *B.* *Per.* Lord Chancellor *Egerton*, No use will arise to *B.* the bargainee, because the bargainor, entering for the condition, ought to be in of the old use and estate, and cannot be seised to any other use; also the fine was levied to *B.* by which *A.* who was the conusor, and also the bargainor, who came in by the use of the fine cannot stand seised to any other use, for then there would be use upon use. — But we are to observe the judgments in these last cases depended on the particular nature of circumstances *ex post facto*, or on the fraudulent intent or illegality of the condition, and do not in the least affect the general validity of these shifting limitations.

There is also a limitation of another kind, which may be considered as an exception to the rule at common law, that an estate limited to take effect on a condition, which is to destroy the particular estate, is void. I mean those cases, where a particular estate is limited with a condition, that after the performance of such an act, or the happening of such an event, the person to whom the first estate was limited, shall thereupon have a larger estate. For it was resolved in the case of Lord *Stafford*, that such a grant may be good, as well of things which lie in grant, as of things which lie in livery; and may be annexed as well to an estate-tail, which cannot be drowned, as to an estate

8 Rep. 74. in
Lord Stat-
ford's case.

estate for life or years, which may be merged by the access of a greater estate. But that such increase of an estate by force of such a condition, ought to have four incidents.

1st, There ought to be a particular estate as a foundation for the increase to take effect upon; which particular estate Lord Coke held, must not be an estate at will, nor revocable, nor contingent. — 2^{dly}, Such particular estate ought to continue in the lessee, or the grantee, until the increase happens, without any alteration of privity in estate, by alienation of the lessee or grantee; though the alienation of the lessor or grantor will not at all affect it; and that the alteration of persons, by descent of the reversion to the heirs of the grantor or his alienee, or of the particular estate to the representatives of the grantee, shall not avoid the condition; and that where the grantee dies before performance of the condition, his heir shall, after he has performed the condition, be in *quodam modo* by descent; and that such increase need not take place immediately upon the particular estate, but may enure as a mediate remainder, subsequent to an intermediate remainder for life, or in tail to somebody else. — 3^{dly}, That the increase must vest and take effect, immediately upon the performance of the condition; for that if

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an estate cannot be enlarged at the very instant of time appointed for enlargement, the enlargement shall never take place; and therefore though the reversion be in the King, it shall instantly be out of him, upon performance of the condition, and vest in the grantee, without petition or *monstrans de droit* or other circumstances; for the awaiting such circumstances, would frustrate and defeat the enlargement; and the law will never require circumstances to subvert the substance.——4thly, That the particular estate, and the increase ought to take effect by one and the same instrument or deed, or by several deeds delivered at one and the same time; (which, in effect, is the same thing, for *quæ incontinenti sunt inesse videntur*) because the particular estate, and the increase thereupon, is only a grant to take effect out of one and the same root; and though the increase vest at a different time, yet when it is vested, it has its force and effect from the same grant. For a more minute discussion of this doctrine, I shall refer the reader to my Lord Coke's report of the said case of Lord Stafford.

Of the Estate necessary to support a Contingent Remainder.

I Shall now consider what estate is required to support a contingent remainder; or, in other words, what kind of estate must necessarily precede it.

1 Rep. 130.
Vide also Bor-
raston's case,
3 Rep. 20.

It is a general rule, that wherever an estate in contingent remainder amounts to a freehold, some vested estate of freehold must precede it. This rule depends upon the necessity there is for the freehold to pass out of the grantor at the time the remainder is created. If no freehold passes, how is the remainder-man to have it? If it passeth at all, it must pass either in the particular estate or in some remainder limited after it; in a contingent remainder it cannot pass, because such remainder at the time of its creation passeth to or vests in nobody; and if it passeth only in some vested remainder limited after the contingent remainder, then is such contingent estate precluded from ever rising at all; for that freehold then becomes vested in possession, which the contingent estate was limited to precede, and of course there is no room left for the introduction of the contingent freehold. It follows, therefore, that some preceding vested estate of freehold must

must be limited, to give existence to such a contingent remainder.

Thus, where there was a devise to trustees for eleven years, and then to the first son of *A.* in tail, &c. and *A.* had no son at that time, it was agreed that such limitation was void as a contingent remainder, because there was no freehold to support it.

1 Salk. 229.
Scatterwood
v. Edge.

So where a devise was to *B.* for fifty years if he should so long live, remainder to the heirs of the body of *B.* remainder to *C.*; the limitation to the heirs of the body of *B.* was void as a remainder for want of a freehold to support it.

1 Salk. 226.
Goodright
v. Cornish.

But where an estate was limited to *A.* for ninety-nine years, if he should so long live, remainder to trustees during the life of *A.* remainder to the wife for her jointure, remainder to the heirs of the body of *A.*; there, though the particular estate was but for years, yet the contingent remainder to the heirs of the body of *A.* was good, because preceded by a vested freehold remainder to the trustees.

2 Vern. 754.
Elie v. Osburn.

There is a case indeed reported by *Moor*, where *A.* covenanted to stand seised to the use of himself for life, remainder to *B.* his brother's eldest son for life, remainder to the first son of *B.* in tail, and so on to his eighth son, remainder

Sir Thomas
Palmer's case.
Moor 815.

remainder to the right heirs of *A.* *A.* was afterwards attainted of treason, and executed before the birth of any son of *B.* and it was resolved, that by the attainder of *A.* the after-born sons of *B.* were barred, and that the crown had the fee-simple discharged of all the remainders limited to sons not then born. Now it seems difficult to reconcile this resolution with the principle that any preceding vested freehold estate will support a contingent remainder; for here, whatever effect the forfeiture of *A.*'s estate for life and remainder in fee might otherwise have had, yet as *B.* had a vested freehold, why was not that capable of supporting the contingent remainder to his sons? There are no reasons given for the resolution in this case, and perhaps to account for it, we are to recur to the supposed necessity (herein after treated of) of a seisin in the feoffees, covenantees, &c. to serve contingent uses, when they come *in esse*, which principle admitted, it may be inferred, (as it seems agreed that the crown cannot stand seised to a use) that there could be no seisin (after *B.*'s forfeiture to the crown) to serve the contingent uses to *B.*'s sons, when they came *in esse*, and that on that account they could never take effect. But I shall endeavour to shew in a subsequent part of this essay, how little reliance is to be had on this principle.

And

And, indeed, to see how little the resolution in *Sir Thomas Palmer's* case is to be attended to, we need only consult the authority of a much later case, where *J. S.* was tenant for life, remainder to his wife for life, remainder to his first and other sons, &c. in tail, remainder to himself in fee; and *J. S.* committed treason, afterwards had a son, and then was attainted; and upon a trial at bar in K. B. the court held, that whether the son was born before or after the attainder, the contingent remainder to him was not discharged by the lands vesting in the crown during the life of *J. S.* because of the wife's estate (*viz.* a vested estate of freehold in remainder) which was sufficient to support it. For in these cases it is to be observed, upon a special office found, no other estate vests in the crown than what the party attainted had; therefore the right of entry of the remainder man is not taken away, but he may enter on the King, upon the determination of the King's estate.

Corbet v.
Tichborn.
2 Salk. 576.

Vide 2 Salk.
469.

The rule respecting the estate, requisite to support a contingent remainder, holds equally in the limitation of uses, as in estates executed in possession at common law: tho' indeed before the statute of uses, if there had been a feoffment to the use of *A.* for years, remainder (of the use) in contingency, the contin-

1 Rep. 134.
5, 8.
Show. Cal.
Parl. 107.

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gent use would have been good, for the feoffees remained tenants of the legal freehold ; but since that statute it is otherwise, for now no estate remains in the feoffees.

2 Salk. 679.
Adams v.
Savage.

Therefore, where there was a lease and re-lease by *A.* to trustees and their heirs, to the use of *A.* for 99 years, remainder to the use of trustees for 25 years, remainder to the heirs of the body of *A.* ; the court held this remainder was void, because there was no preceding estate of freehold limited to support it.

Davis v.
Speed.
2 Salk. 675.
Carth. 262.
Show. Caf.
Parl. 104.
Vide supra,
p. 42.

So where the husband and wife covenanted to levy a fine of the wife's lands to the use of the heirs of the body of the husband on the wife begotten, this limitation was void for want of a preceding freehold. For in this case, the husband did not take an estate for life by implication, because the estate was the wife's, and moved originally from her.

As to a contingent remainder for years, there can be no necessity for a preceding freehold to support it. For the remainder not being freehold, there can be no occasion for the freehold to pass out of the grantor in order to give it effect.

But

But in the case of *Corbet v. Stone*, where *A.* by indenture, leased to *B.* and *C.* for 40 years, if *A.* should so long live, in trust for *A.* to receive the profits during her life, and that after her decease, one moiety should be to *D.* and the other moiety to *E.* (no parties to the deed) their executors, administrators and assigns, severally and respectively, for the term of 1000 years. *A.* levied a fine and died, and five years passed after her death, and the plaintiff claimed under *C.* and entered: it was insisted, that the limitation to *D.* and *E.* was a remainder, though contingent as limited after the death of *A.*, before which the preceding estate for forty years might determine; the court objected that it could not pass as a present estate, because *D.* and *E.* were not parties to the deed, and that it could not be a contingent remainder, being a remainder for years depending on an estate for years; and that there could not be a contingent estate for years; because a lease for years operates by way of contract, and therefore the particular estate and the remainder operate as two distinct estates grounded upon several contracts.—But *quære* of this opinion, for it seems not well considered; nor indeed did the court seem to rely upon it, for they said, admitting the term of 1000 years a contingent remainder, it was barred by the fine and non-claim, and gave judgment on that ground.

Raym. 140.
Corbet v.
Stone.

And vide
3 Leon. 23.
in *Cranmer's*.

Although every contingent freehold remainder must be supported by a preceding freehold, yet it is not necessary that such preceding estate continue in the actual seisin of its rightful tenant; it is sufficient if there subsists a *right* to such preceding estate, at the time the remainder should vest, provided such right be a right of *entry*, and not a right of *action* only: for whilst a right of entry remains, there can be no doubt but the same state continues; since the right of entry can exist only in consequence of the subsistence of the estate; but when the right of entry is gone, and nothing but a right of action remains, it then becomes a question in law whether the same estate continues or not; for the action is nothing more than the means of deciding this question. Another estate is in the mean time acknowledged and protected by the law, till such question be solemnly determined in a court of justice, upon the action brought.

12 Mod. 174.
in the case of
Thompson v.
Leach.

Thus, if *A.* be tenant for life with a contingent remainder over, and tenant for life be disseised, all the estates are divested; but the right of entry of tenant for life will support the contingent remainders; but in this case if the contingent remainder does not vest, before such a descent be cast as will take away the entry of tenant for life within the statute of *H. 8. c. 33.* and drive him to his action, then is the
contingent

contingent remainder gone ; because there no longer subsists any right of entry to support it, that right being turned into a right of action.

So where a gift in tail was to *A.* remainder to the right heirs of *B.*, *A.* made a feoffment in fee, and afterward *B.* died ; the right heir of *B.* was not intitled to the estate, because there was no particular estate either *in esse* or *in right* to support the remainder when it fell ; for *A.* had no right against his own feoffment, nor had his issue right till after his death, and then a right of action only, his feoffment having worked a discontinuance ; but (said Chief Justice *Charlton*) if tenant in tail be disseised and dieth, the same shall not take away the right of the contingent remainder, for there the right of the particular estate remaineth in disseisee, and supports the contingent remainder. 1 Rep. 135.

So where *A.* covenanted to stand seised to the use of himself for life, remainder to the use of his wife for life, remainder to the use of his daughter for life, remainder to the use of her first son in tail, and so to the use of her other sons successively in tail, reversion to the use of his own right heirs ; and afterwards he granted the reversion without consideration,
reciting

2 Roll. Abr.
796. pl. 11.
Wegg v. Vil-
lers. This
was the case
of a settle-
ment by Sir
Edward Coke
Vide 2 Sid.
64, 98. 129,
157.
Heyns v. Vil-
lers.

Vide 2 Sid.
159.

Vide infra.
p. 219.

reciting the former settlement; and after that he made a feoffment of the lands; then the daughter had issue a son; *A.* died, the wife entered, then the daughter died, and then the wife; it was resolved that the grant did not hinder the arising of the contingent uses, because it was without consideration, and the first uses and estates were recited in the grant, so that the grantee had notice, and therefore took the lands subject to the grantor's covenant to stand seised; and that the feoffment did not destroy the contingent estate, because the right of remainder for life in the daughter, upon which she might have entered for the forfeiture, did support it; for the feoffment of *A.* was a forfeiture of his estate for life, and of the estate of his wife in remainder during the coverture; so that the daughter might have entered for the forfeiture during the coverture, and this right of entry was sufficient to support the contingent remainder to the first son, &c. without question.—But it was held by *Glyn* Ch. J. that if, in this case, the feoffment had been made before any grant of the reversion, the contingent use would have been destroyed, notwithstanding the right of entry in the daughter, the ground of which opinion will be explained in a subsequent page of this tract.

But

This right of entry to support a contingent remainder, must be a *present* right, a future one will not do; it must also precede the contingency, and be actually existing when that happens, for if it only commences at the same instant with it, the remainder it seems will not vest: according to what was observed in the above cited case of *Wegg v. Villers*, where the court said, that the case would have been more dubious, if the daughter had not had any estate for life, but the contingent remainders had depended on the estate of the wife immediately; where the feoffment of the baron had destroyed them; inasmuch as the feoffment of the baron passed his estate and the estate of his wife during the coverture, so that none could enter during the coverture; and neither the estate of the baron nor of the wife would be *in esse*, during this time, to support the contingent uses; for it seems the future right of the wife to enter after the death of the baron, is not sufficient for this purpose.

1 Ventr. 189.
Lord Raym.
316.

So in a subsequent case, where baron made a feoffment to the use of himself and his wife, and of the heirs of the survivor of them, and afterwards made another feoffment of the same lands; it was adjudged that the right of entry in the wife was not sufficient to support the contingent fee, and vest it in her on the death of

Cro. Car. 102.
Bigot v.
Smith.

of the baron. In this case we observe that the particular estate was not subsisting at the husband's death, when the fee should have vested, for his second feoffment had destroyed it during the coverture; and though the wife's right of entry took effect at the instant the remainder should have vested, yet it was insufficient, for it should have been then actually existing.

Vide foregoing cases.

But where the estates are limited by way of use, and are afterwards divested and turned to a right; it has been held requisite to the execution of the subsequent contingent uses, that either the *cestui que use* under some preceding vested use, or else that the feoffees or their heirs should enter in order to re-vest the estates; for although contingent uses are not destroyed by such a divesting of the preceding estate as turns it to a right of entry, as they would be if such estate was determined, or turned to a right of action only; yet, it is said, there must, at or after the time when such uses come *in esse*, exist a seisin in the feoffees out of which they may arise, before they can be executed by the statute. This doctrine apparently involves some degree of difficulty in it, I shall therefore endeavour to explain it.

It

It appears to have been the opinion of the court in *Chudleigh's case*, that upon a conveyance to uses there is no actual seisin left in the feoffees: but that as to all the uses *in esse*, and which vest immediately, the seisin is presently transferred unto the *cestui's que use*, and that as to the uses not *in esse*, there is no present seisin existing any where; but only a possibility of a seisin in the feoffees, to serve those uses when they come *in esse*; which takes effect as the contingencies on which the uses depend arise, so as then to give the feoffees, &c. a sufficient seisin to serve such uses, that they may be executed by the statute, if the estates limited in the conveyance to uses be not in the mean time divested; but that if the estates happen to be first divested, then that possibility of a seisin in the feoffees is divested as well as the other estates, and must be reduced and re-vested before the contingent uses can be executed.

Vide *Chudleigh's case*.
1 Rep. 120.

Now if this divesting or disturbance of the estates limited in the conveyance to uses, has operated so far, as not to leave a right of entry in any preceding vested estate, then is the contingent use entirely destroyed and gone, as we have already seen, for want of a preceding estate to support it; but if a right of entry is left in any preceding vested estate, then, it is said, the *cestui que use* having such right
of

Vide *Bigot v. Smith* supra,
p. 215.

of entry, may, by his entry, re-vest the estates which were de-vested, and amongst the rest the possibility of a seisin in the feoffees to serve the contingent uses: but that if no such entry should be made, then the feoffees or their heirs must enter to re-vest their seisin, for that otherwise there would exist no seisin to serve the contingent uses when they arise; and consequently that if the feoffees should bar their own right of entry, upon such an occasion, by feoffment, release or otherwise, the contingent use can never be executed for want of a seisin in the feoffees out of which it may arise; and that the *cestui que use* will then have no other remedy than against the feoffees in a court of equity for breach of trust.

Vide Mansel
v. Mansel,
infra.

1 Roll. Abr.
795. pl. 12.

Ibid. pl. 13.

As if a feoffment be made to the use of *A.* for life, remainder to the use of *B.* for life, remainder to the use of the eldest son of *B.* in tail, &c. here the feoffment of *A.* (it is clear) will not destroy the contingent remainder to the son of *B.* because of the right of entry in *B.* upon the forfeiture of *A.* and it is said, that if *B.* enters either in the life-time of *A.* or after his death, this will reduce the contingent remainder; so that if a son be born in his life-time, it shall be executed by the statute without any entry of the feoffees.

And

And it has been further said, that if after the feoffment of *A.*, *B.* dies without having entered, though he should have a son born in his life-time, that son cannot enter, the seisin of the feoffees having been disturbed and not re-vested; but that in this case the feoffees may enter, and thereby revive the contingent use, which by their entry, it is said, will be executed in such son by the statute; but that if after the death of *B.* without entry, the feoffees should by feoffment or otherwise bar their entry, then the contingent use can never be executed for want of a seisin in the feoffees to serve it. These points, it seems, were agreed upon by *Rolls C. J.* and the other Judges of the King's-Bench in their debate of the case of *Wegg v. Villers*.

1 Roll. Abr.
797. pl. 14.

Ibid. pl. 16.

It is this supposed necessity for the existence of a seisin in the feoffees, at or after the time when the contingency happens, in order to serve the contingent use, that accounts for the observation before cited, as made by *Glyn C. J.* with respect to the case of Sir *Edward Coke*, viz. that if Sir *Edward* had made the feoffment before he had granted the reversion, the contingent use to the first son of his daughter, had been destroyed. It was agreed in *Chudleigh's* case, that privity of estate is absolutely requisite to the standing
seised

2 Roll. Abr.
795. pl. 11.

Vide supra,
p. 214.

seised to a use : that is; that a person must come in *of* or *under* the same estate or seisin, out of which the uses were originally limited to arise; otherwise he is not seised to those uses. Now in the case of Sir *Edward*, the contingent uses were to arise out of the estate or seisin which was in him before he granted the reversion, *i. e.* out of the reversion after the death of his wife and daughter; for the seisin of the particular uses *in esse* were executed to the uses by the statute; so that Sir *Edward* actually stood seised of nothing more than the reversion. Therefore, when Sir *Edward* granted the reversion without consideration, and reciting the uses, he did no more than grant or transfer that same estate or seisin which was then in him, and out of which the contingent uses were to arise; and consequently his grantee, who came in in privity of the same estate and seisin, stood seised to the uses which were to arise thereout, being the same to which Sir *Edward* stood seised before such grant; then the subsequent feoffment of Sir *Edward*, devested this estate and seisin of his grantee, together with the estates of the wife and daughter; but as long as there was a right of entry in the daughter, that was sufficient to support the contingent use to her first son, provided there should be a seisin to serve it when it should arise; for though in conveyances at common law,

law, a right of entry in some preceding estate, would alone have preserved a contingent estate, and no entry of the person intitled to such preceding estate was requisite to give effect to the contingent remainder; yet, the doctrine I have been just now explaining, required that where the limitations were by way of use, there should, besides a right of entry in some preceding estate, be also a seisin subsisting in the feoffees, &c. to serve the contingent use when it arose.

Now, when the wife entered after the death of Sir *Edward*, she thereby reinstated all the devested estates, and amongst the rest the estate and seisin of Sir *Edward's* grantee: which I have already observed was the estate or seisin out of which the contingent uses were to arise; so that the seisin which was to serve these contingent uses was restored by this means. Thus we see the right of entry in the daughter supported the contingent use to her son, so as to preserve its capacity of taking effect, if the seisin, out of which it was to arise, should be subsisting at or after the birth of such son, in order to be executed to the use by the statute; and the entry of the wife re-vested and restored the seisin which was to serve that use when it came *in esse*. But if Sir *Edward* had made a feoffment in the first instance, though without consideration and with notice; yet, as that
feoffment

feoffment would have been a disseisin and divesting of all the estates then subsisting, and of course of that estate or seisin out of which the contingent uses were to arise, and which was to serve them; the feoffee would not come in in privity of that estate or seisin out of which such uses were originally limited to arise, but would come in of a new estate acquired by disseisin, and of consequence could not, according to the doctrine I have been explaining, stand seised to those uses; and therefore as there would then have subsisted no seisin to serve the contingent uses when they arose, though the right of entry of the daughter supported the contingent use to her son, so as to preserve its capacity of taking effect, if the seisin out of which it was to arise had been subsisting, yet (admitting the doctrine above explained) such contingent use must fail for want of a seisin to serve it; for the feoffee we see could not stand seised to such use, he not coming in in privity of the estate or seisin out of which it was to arise; and no entry of the wife or any one else could restore the estate and seisin of Sir *Edward* or his heirs, contrary to his own feoffment.

But all that has been said, in regard to the supposed necessity of an entry to revest and restore contingent estates, relates only to estates limited or created by way of use. For
in

in estates created by conveyances at common law, there is no sort of doubt, that a mere right of entry without any actual entry at all made, supports the contingent remainder : as if a gift in tail be made to *A.* remainder to the right heirs of *B.*, if tenant in tail be disseised and die, the remainder is not destroyed, for the right of the particular estate supports it. — And so in *Archer's* case, if *Robert* had been disseised and died, it was held that the remainder would have been good, because the particular estate would have remained in right, and might have been revived.

1 Rep. 135 b.

Supra, p. 102.

1 Rep. 67.

What I have above been endeavouring to explain, respecting the supposed necessity of an actual entry to restore or reduce contingent uses after they have been divested, is, indeed, the doctrine expressly laid down by *Rolls* C. J. and his brethren the judges of the K. B. in their arguments upon the said case of *Wegg v. Villers*, and alluded to by *Glyn* C. J. in his argument upon the case of *Heyns v. Villers*, reported by *Skinner* ; and therefore I could not pass it by, consistently with my professed design in this essay. Yet, I cannot help observing, that I think we ought to be very cautious how we at this day admit such a doctrine in practice ; a doctrine which would lead us to conclude, that in the common cases of strict settlement upon

upon marriage, where the conveyance is by way of use, if the father, the first tenant for life, were by feoffment, &c. to divest the estates, (leaving them a right of entry) the contingent remainders to the sons, &c. could not take effect unless the mother, supposing her to take a remainder for life and to survive the father, or else the trustees to whom the remainder for preserving contingent uses was limited, or else the general grantees or releasees to whom the lands were conveyed to the uses expressed, should actually make an entry into the lands; an opinion which, with all due deference to what was delivered by the court of K. B. in their arguments upon the said case of *Wegg v. Villers*, I cannot persuade myself would hold at this day; for,

First, as to what was resolved in the said case of *Wegg v. Villers*, we are to observe, that as there was besides the right of entry in the daughter, an actual entry made by the mother in that case, the point whether the mere right of entry in the daughter would have been sufficient, without any entry by her or by the mother, or by the grantee, was not the question which came before the court; nor of consequence, did the judgment of the court in that case, depend upon or establish the doctrine in regard to that point. And as to the other cases put and agreed to by the court in their

their debate of the principal case, the opinions upon them were really extrajudicial; and, indeed, so far as they respected the supposed necessity of an entry to restore or reduce contingent uses, they appear to have been founded on an artificial strain of reasoning, much too subtle and metaphysical to bear the weight of any great stress.

If we are to infer (as is said in the arguments in *Chudleigh's case*) a *scintilla juris* in the feoffees, that may enable them to enter and restore their possibility of a seisin, (or, if the contingency has happened, their actual seisin) to serve the contingent uses, what is it that confines us to such narrow and insufficient limits in regard to the measure of this *scintilla juris*? Why not extend the inference one degree further, and suppose such a *scintilla juris* as may be competent to serve the contingent uses, without the unnecessary circuitry of an actual entry? The latter inference is certainly more adequate and better adapted to the end proposed; and what is there discoverable in the statute of uses, which excludes this and admits the former? Nay, how does it appear that any thing contained in that statute, puts us to the necessity of recurring to any *scintilla juris* at all in the feoffees, or any entry to be made either by them or by the *cestui que use*

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under

under any preceding vested use, in order to restore and reduce a contingent use to the capacity of taking effect, whilst a right of entry subsists in any preceding *cestui que* use? On the contrary, does not the statute expressly enact, that where any person, &c. is seised to the use of others, such other persons, *i. e.* the *cestuis que* use, shall be deemed and adjudged in lawful seisin, estate and possession, &c. *to all intents, constructions and purposes in the law*, of and in such like estates as they had in the use &c.? And must not these words *to all intents, constructions and purposes in the law*, be referred to the legal properties, qualities and capacities of estates of the like degree or measure at common law? If so then, the *cestuis que* use become intitled to, and take by virtue of this statute, estates possessing and bearing in themselves all the qualities, properties and capacities of estates at common law, of the like degree or measure; now one of the legal qualities or capacities, of an estate at common law, of the degree or measure of freehold is, that after it is divested and turned to a right of entry, such right of entry will support a contingent remainder; and one of the qualities or capacities of a contingent remainder at common law is, a capacity of being supported by such right of entry: why then do not, a preceding vested use, of the degree or measure

measure of freehold, and a subsequent contingent use, respectively, acquire these legal qualities, properties or capacities, amongst other qualities or properties of estates of like nature and degree at common law? If they do, it is obvious there can be no necessity for any actual entry by any body, to restore a contingent use where there subsists a right of entry in a *cestui que* use of a preceding vested freehold to support it; but such right of entry alone will preserve its capacity of vesting and taking effect; if we deny this, we at the same time deny that the *cestuis que* use have lawful seisin, estate and possession, &c. to all intents, constructions and purposes in the law, of such estate as they have in the use?

I might here adduce other reasons of a more abstruse nature, drawn from a consideration of the nature of uses at common law, as they stood before the statute, to shew the needlessness of an entry by the feoffees, or any body else to restore contingent uses, whilst a right of entry subsists in any *cestui que* use of any preceding vested freehold; but I hold it altogether unnecessary; as what I have already remarked upon the apparent operation of the statute of uses in relation to this point, seems to me sufficient to prevent our too hastily admitting a doctrine, which, without the aid of metaphysical

taphysical subtleties, seems hardly reconcilable to the direct express force of that statute.

2 Jon. 124.
Key v. Gamble.

In regard to the estate requisite to support a contingent remainder, it is further to be observed, that the estate supporting and the remainder supported, should both be created by one and the same deed or instrument; therefore an estate for life given by one deed will not support a remainder given by another, nor an estate for life settled by *A.* on *B.* by deed, enure to support a contingent remainder given by the will of *A.*

4 Mod. 316.
Eq. Abr. 182.
1 Ld. Raym.
37. Skinner
558. Moor
v. Parker.

As where *A.* being tenant for life by marriage-settlement, remainder to his wife for life, remainder to his first and other sons by that marriage in tail-male; his father, the reverser, reciting the settlement in his will, and devising the lands to the first son of *A.* &c. according to the settlement, then if *A.* should die without issue of that marriage, he devised to the first and other sons of *A.* by any other wife in tail-male, and if *A.* should *die without issue*, then he devised that all the land should go to his grandchildren by his daughter *P.* in fee. It was contended, that *A.* under this devise took an estate-tail by implication; and of course the remainder over in fee was well supported. But the court held it was impossible to make this an estate-tail in *A.* for nothing was given him
by

by the devise, but he had only the estate which he had by the first settlement. That here being two several conveyances, the devise could not be tacked to the estate for life which was limited by another conveyance, even admitting that the word issue could be an implication of an estate to the heirs of the body of *A.*

Vide this case
infra.

So where feme being tenant for life, her husband devised to the heirs of her body if they attained fourteen years, it was no remainder, but an executory devise; for tho' the wife had a preceding estate for life, yet this was a new devise, to take effect after her decease, and was not a remainder joined to an estate.

Snow v. Cutler. Lev. 135.
Raym. 162.
Sid. 153.

But where *A.* made a feoffment to the use of himself for life, and after the death of *A.* and *M.* his wife, to the use of *B.* (eldest son of *A.*) for his life; this was held to be a contingent remainder in *B.* But though it did not appear in the case, yet it afterwards appearing upon examination, that by a former deed *M.* had an estate for life; Lord Chief Justice *Hale* said the use should not be contingent; but the mentioning that the commencement thereof should be after the death of *M.* was only expressing when *B.* should take the

Pollexf. 66.
in the case of
Weale and
Lower.

Vide Badger
v. Lloyd in-
fra.

the profits in possession ; and did not make a contingency. For here we are to observe, that Chief Justice *Hale* considered it as a conveyance of the immediate reversion or remainder, expectant on the death of *M*.

It seems, that in cases where estates are devised in trust, there is no necessity for particular trustees to support contingent limitations, the legal freehold in the general trustees will be sufficient for the purpose ; and consequently in such cases, it is not necessary that a contingent remainder should vest by the time the preceding trust-limitation expires.

Cas. Temp.
Talbot, 145.
Chapman v.
Blisset.

As where the testator devised his estate, real and personal, to trustees and their *heirs, executors and assigns* upon trust, to pay an annuity to his son *B.*, and after *B.*'s death, he devised one moiety thereof to such children as *B.* should leave and their heirs, and the other moiety to the future children of his grandson *C.* &c. the testator died, afterwards *B.* had children and died, and afterwards *C.* had issue ; it was contended that the legal estate in the trustees was determined at *B.*'s death, and therefore the limitation to *C.*'s children, being a *contingent remainder*, because limited *per verba de presenti*, and not vesting upon the death of *B.* (because *C.* had then no children born), could never vest at all ; but it was held, that notwithstanding

ing the limitation was *per verba de presenti*, as *C.* was very young at that time, the testator must have intended a future devise; and therefore it might well take place as an executory devise; but if it were taken as a *contingent remainder*, as some of the trusts mentioned in the will, would not admit the estate in the trustees to be confined to the period of *B.*'s life; the estate continuing in them would support the limitation to *C.*'s children, though it could not vest at *B.*'s death; and therefore whether it were taken as a future limitation or a *contingent remainder*, it would be good either way.

That trustees have a fee without words of limitation where the purposes of the trusts require it, vide 1 Vezey 491. 3 Burrow 1686.

So where *A.* devised to the use of trustees, and their heirs, in trust for *B.* for life, remainder to his first and other sons successively in tail, remainder to the future sons of *C.* successively for life, remainder over; *B.* died without issue in the testator's life-time; the contingent limitations were taken as executory devises, because no child was then born to *C.*; afterwards a child was born to *C.* and died, and a subsequent remainder-man claimed the estate, upon a supposition that all the preceding intermediate limitations which could not vest at the death of such child were destroyed; as it had been decreed, that upon the vesting of the executory devise in that child the subsequent limitations became *contingent remainders* upon that

Caf. Temp.
Talbot. 41.
Hopkins v.
Hopkins.

1 Vezey 268.
Hopkins v.
Hopkins.
1 Atk. 581.

that executory devise; but it was held, that the inheritance in the trustees was sufficient to support the intermediate *contingent remainders* till they should come *in esse*, although no particular estate to support, &c. was inserted; and that the estate should not vest in possession, whilst an object of any preceding limitation might come *in esse*.

Yelv. 9, 10.
Salter v. Butler.

If rent be granted to *A.* for the life of another, the remainder over, though the grantee dies, so that the remainder determines in interest as to the perception of the profits; yet in as much as the *terre-tenant* during this time, holds the lands discharged, it is sufficient to support the remainder. *Per Popham*, and agreed by the whole court, in the case of *Salter v. Butler*.—But *quære* whether this holding of the land discharged, would have supported a contingent remainder? Though it seems indeed, that in these cases of rents *pur autre vie*, upon the death of the grantee before the *cestui que vie*, (though strictly there is no general occupancy of rent) the *terre-tenant*, by holding the land discharged, *i. e.* retaining the rent, might, perhaps, be considered in the nature of an *occupant* of the rent; and therefore in that view, the particular estate might be understood to have a continuance, sufficient even to support a contingent remainder. But
at

at this day, it seems there can be no room for a question of that nature; for since the statutes of 29 Car. 2. c. 3. and 14 Geo. 2. c. 20. the rent is holden to continue in the representatives of the grantee dying in the life-time of *cestui que vie*.

Vide 3 P. W.
264. in the
note.
Barnardist.
Rep. in Chan.
46 Kendal
v. Micfield.

Of the Time when a Contingent Remainder should vest.

WE are now to consider the time at which it is requisite a contingent estate should *vest in interest*; that is, at what period, with respect to the duration of the preceding estate, the contingency upon which such remainder is limited to take effect, ought to happen.

It is not only necessary that a vested freehold estate should precede a freehold contingent remainder, as we have already seen; but some preceding freehold estate must subsist and endure until the time when the contingent remainder vests, that is, until the contingency comes to pass; for it is a general rule, that every remainder must vest, either during the particular estate, or else at the very instant of its determination. So that if a lease be made to *A.* for life, and after the death of *A.* and one day after,

Plow. 25.

after, the land shall remain to *B.* for life, this remainder to *B.* is void, because it cannot take effect immediately upon the determination of the preceding estate. This rule was originally founded on feodal principles, and was intended to avoid the inconveniencies which might arise by admitting an interval, when there should be no tenant of the freehold, to do the services to the Lord, or answer to *strangers præcipes*, as well as to preserve an uninterrupted connection between the particular estate and the remainder, which in the consideration of law, are but several parts of one whole estate.

1 Inst. 298. a.

There are two or three instances of *vested* remainders taking effect, though the preceding estate be defeated. As where lessor disfeiseth *A.* his lessee for life, and makes a lease to *B.* for the life of *A.* the remainder to *C.* in fee; here, though *A.* enter and defeat the estate for life, the remainder to *C.* is good: for having been once *vested* by a good title, it would be unreasonable that the lessor should have it against his own livery. So if a lease be made to an infant for life, if the infant at his full age disagree to the estate for life, yet the remainder is good, having once been *vested* by a good title. So if a rent be granted to the tenant of the land for life, the remainder in fee, this is a good remainder in fee, though the

the particular estate continue not : for *eo instanti* that he took the particular estate, *eo instanti* the remainder *vested*, and the suspension in judgment of law grew after the taking the estate. So if a lease be made to *A.* for the life of *B.*, the remainder to *C.* in fee ; *A.* dieth, now (at common law) before the entry of an occupant, there was no particular estate, and yet the remainder continued good. But now since the statutes 29 Car. 2. c. 3. & 14 Geo. 2. c. 20. no such vacancy of the particular estate can happen.—But, however, it follows from the rule I have just mentioned, that where the event on which a *contingent* remainder is limited to take effect, does not happen by the time at which the preceding estate determines, it never can arise or take effect at all.

Thus, where *A.* being tenant for life, remainder to his eldest son in tail, *A.* died, leaving his wife *enfeint* with a son, who was afterwards born ; the question was, Whether this son was entitled to the remainder under the limitation ? And it was adjudged in the Common Pleas, and that judgment affirmed in the King's Bench, that such posthumous son could not take, because he was not born when the particular estate determined. The judgment, it is true, was afterwards reversed in the House of Lords ; but it was against the opinion of all the judges, who were much dissatisfied with the reversal ; and indeed an act of parliament

1 Salk. 227.
Reeve v.
Long.

Stat. 10 & 11
W. III. c. 16.

parliament was thought necessary to take such cases as that out of the old law ; by which it was enacted, that *where any estate is settled in remainder to children, with remainder over, any posthumous child may take in the same manner as if born in the father's life-time.*

1 Inst. 378. a.

So if a lease for life be made with remainder to the right heirs of *J. S.* this remainder will never vest if tenant for life die before *J. S.* ; for in that case the particular estate determines before the contingency comes to pass on which the remainder is limited to take effect, *i. e.* the death of *J. S.* ; for *nemo est hæres viventis.*

Jenk. 248. pl.
38. 2 Roll.
Abr. 41 S.
(1) pl. 4.

So where *A.* seised of lands in fee, makes a lease for years to *B.* remainder in tail to *C.* remainder to the right heirs of *B.* in this case *B.* has nothing in the fee, but it is a contingent remainder to his heir, (for *B.* did not take the freehold). If *C.* dies without issue in the life-time of *B.*, the remainder becomes void : for the foundation and support of this contingent remainder fails, because it ought to have a freehold to support it, when the remainder falls out ; but by *C.*'s death without issue, living *B.*, the freehold is expired before *B.* can have an heir, and therefore the remainder will never take effect.

But

But although no interval is admitted between the determination of the particular estate and the vesting of the remainder; yet a remainder may be so limited, as not to vest until the very instant in which the particular estate determines. As if an estate be limited to *B.* during the like of *A.* remainder to the heirs of the body of *A.* this is good, though such remainder cannot vest till the very instant in which the particular estate determines. So if land be given to *A.* and *B.* during their joint lives, remainder to the right heirs of him who shall die first, this remainder will be good, though it cannot vest before the determination of the particular estate; and it is also observable, that the heir of him who dies first, shall have the land by descent, in conformity to the rule before treated of, where the ancestor takes a freehold with a subsequent limitation to his heirs in the same conveyance.

1 Inst. 298. a.

1 Inst. 378 b.

Upon the principle here laid down, that a contingent remainder must vest by the time the preceding estate determines; it follows, that an estate limited on a contingency may fail as to one part, and take effect as to another, wherever the preceding estate is in several persons in common or in severalty; for the particular tenant of one part may die before the contingency, and the particular tenant of another part may survive it.

As

Lane v Pannel. 1 Roll.
Rep. 238.
317. 438.
Supra, p. 46.

As in the case of *Lane* and *Pannel*, which as to the present point was in effect as follows: Feme covert and a stranger, being joint tenants for life of copyhold lands, with remainder to the heirs of the body of baron and feme; the stranger surrendered his moiety to the baron and feme, and afterwards the baron surrendered the whole to *B.* in fee, the feme died, leaving issue, and afterwards the baron died; the question was, Whether the remainder to the heirs of the body of the baron and feme vested in the issue? And it was adjudged, that when the stranger conveyed his moiety to the baron, the jointure between the stranger and feme covert was severed; and when the baron afterwards conveyed the whole to *B.*, *B.* took an estate in one moiety for the life of the feme (defeasible by her on the death of her husband) and in the other moiety for the life of the stranger; therefore upon the death of the feme the estate in the first moiety was determined, at which time the remainder, as to that moiety, ought to have vested, which it could not do, because the person to take it was to be heir of the bodies of both baron and feme; but that was impossible during the life of the baron (for *nemo est hæres viventis*); and therefore, as the remainder could not vest at the determination of the preceding estate, it should never vest at all as to that moiety. In this case

case it appears that the remainder failed as to one moiety.

So likewise a contingent remainder may take effect in some, and not in all the persons to whom it was limited; according as some may come *in esse* before the determination of the preceding estate, and others not. As if a limitation be to *A.* for life, remainder to the use of the right heirs of *J.* and of *K.*; here, if *J.* happen to die before *A.*, and *K.* to survive *A.*, the heirs of the first may take, but those of the latter, it seems, will be for ever excluded; for the heirs of *J.* are *in esse* at the determination of the preceding estate, but not the heirs of *K.* who is then living, for *nemo est hæres viventis*.

Comb. 467.

But where a contingent remainder is limited to the use of several, who do not all become capable at the same time; notwithstanding it vests in the person first becoming capable, yet shall it divest as to the proportions of the persons afterwards becoming capable before the determination of the preceding estate, and vest in them respectively. As where a conveyance was to the use of *A.* the husband for life, remainder to *B.* the wife for life, remainder to all the issues-female of their two bodies, and the heirs-male of the bodies of such issues-female; *A.* and *B.* had issue a daughter: and it was resolved,

Comb 467.
Matthews v.
Temple.
1 Ld. Raym.
311. vide
Stra. 1172.

resolved, that the remainder in tail to the issues-
female was not so attached in that daughter, as
not to be devested for a moiety on the birth of
another daughter ; for such a limitation, being
by way of use, springs out of the estate accord-
ing to the capacity of the person in whom it is
to rest.

So if there be a limitation to *A.* for life, re-
mainder to the use of the right heirs of *B.* and
C. ; though *B.* should die before *C.* yet the
heirs of *C.* shall take, if he die before *A.* ; and
the heirs of *B.* and *C.* it seems will be joint-
tenants of the freehold, and tenants in common
of the inheritance. So it is if a future use be
limited to two, where one becomes capable be-
fore the other. As if I make a feoffment to
the use of my wife that shall be, and my first
begotten son for their lives, and I afterwards
marry, my wife will take the whole use ; and
if I afterwards have a son, he will then take
jointly with my wife.

Bac. Law
Tracts, 351.
Vide Co.
Lit. 188. a.
Dyer 339. b.

Vide 2 Salk.
577. 2 Lev.
39.

3 Keb. 87.
Cole v. Le-
vingstone.
: Ld. Raym.
314.

And here it is to be observed, that if there
be no particular estate *in esse*, nor any present
right of entry when the contingency happens,
although the particular estate be afterwards re-
placed and restored, yet will the remainder ne-
ver arise.——Only it seems that the reversal of
a fine by act of parliament, will restore a con-
tingent remainder destroyed by that fine,
though a reversal for error will not.

How

How Contingent Remainders are destroyed or prevented taking effect.

IT has been already shewn, that a remainder must vest either during the existence of the particular estate, (*in esse* or *in right of entry*) or at the very instant of its determination, otherwise it will never take effect at all. Consequently, every such determination of the preceding estate before the contingency happens, as leaves no right of entry, must effectually destroy a contingent remainder. I shall first instance some cases wherein the determination of the preceding estate ariseth by the feoffment, forfeiture, surrender, or other act of the particular tenant; and afterwards consider those cases, wherein the preceding estate is merged by descent of the inheritance on the particular tenant; for where the inheritance comes by descent on the particular estate, we shall find some exceptions to the generality of the preceding conclusion.

Where lands were devised to *A.* for life, and after to the next heir-male of *A.* and the heirs-male of the body of such next heir-male; *A.* having issue a son, made a feoffment to *B.* upon whom the son entered, and it was adjudg-

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ed

1 Rep. 66.
Archer's case.

Vide supra,
p. 102.

ed that this was a contingent remainder to the son of *A.* and therefore was destroyed by the feoffment of *A.* who was but tenant for life; for that every remainder must vest either during the particular estate, or *eo instanti* that the particular estate determines: in this case the particular estate was determined by the feoffment of *A.* and since the remainder could not then vest, for *nemo est hæres viventis*, it could never afterwards arise.

2 Lev. 39.
Purefoy v.
Rogers.
2 Saund. 380.
And vide f. c.
infra.

So where feme covert was tenant for life, with remainder to her first son, and before the birth of any son, the reversion in fee was conveyed to the husband and wife by fine; a son was afterwards born, the feme died; and the court held, that although, if the feme had survived her husband, she might have waived and avoided the estate taken by the fine; yet the contingent remainder to the son was utterly destroyed, he not being *in esse* when the particular estate determined; that the baron and feme took by entirety, and so the estate for life of the wife was merged before the contingency happened; and that the possibility which the wife had of waiving the inheritance given by the fine, and thereby reviving the particular estate for life, would not preserve it. For that if the particular estates which support contingent remainders are not *in esse* when the contingency happens, the contingent estates can never

ver arise, whether it happens by surrender, merger, or any other way.

So where there was tenant for life, with remainder to his first and other sons successively in tail, remainder to *B.* in tail; tenant for life, before the birth of any son, surrendered to *B.*; a son was afterwards born, and the court held, that the surrender, if good, would have barred the contingent remainder; but the surrender was adjudged void, because it afterwards appeared, that the surrenderor was *non compos* at the time of the surrender.—*Jenkins* I observe states a case, and says if *A.* makes a lease for life to *B.* remainder to the right heirs of *J. D.* if *B.* in the life-time of *J. D.* surrenders to *A.* yet the lease supports the contingent remainder. He refers to the pleadings in *Archer's* case, 1 *Rep.* 63. and to 1 *Rep.* 113. for this point: but I can discover nothing in either of those places respecting it: it is said indeed, 1 *Rep.* 130 1, that if a lease be made for life, remainder to the right heirs of *J. S.* if lessee for life maketh a feoffment or dieth during the life of *J. S.* the remainder to the right heirs of *J. S.* is destroyed: but this so far from supporting, makes directly against the point, so far as it goes. And indeed from the case which *Jenkins* puts immediately afterwards, there is reason to think that something has been omitted in his state of the case I have cited;

Thompson v. Leach.
2 *Vent.* 198.
2 *Salk.* 427.
5:6. 618
1 *Ld. Raym.* 313.

Jenk. Cent.
248. pl. 38.

but be that as it may, the resolution in the foregoing case of *Thompson v. Leach*, clearly proves the case cited from *Jenkins* not to be law.

And here I shall refer, for further instances, to the case of *Carter v. Barnardiston* and *Lodington v. Kime*, as cited in a subsequent part of this essay.

2 Roll. Abr.
794. pl. 6.

We are to remember, however, that the surrender of a copyhold will not destroy a contingent remainder; as where *A.* seised of a copyhold in fee, surrendered it to the use of his will, and afterwards devised it to *B.* for life, the remainder to *his heirs of his body* begotten. *B.* was admitted, and surrendered it to the lord of the manor, to the use of the lord *to do his will* with it. *B.* died; the question was, Whether admitting the limitation to the heirs, &c. to operate as a remainder, such remainder was destroyed by the surrender of *B.*? It was adjudged that the remainder was not destroyed, because the legal freehold was in the lord during the life of *B.*; so that even a vested remainder-man could not have entered during *B.*'s life; but it was afterwards adjudged, that the limitation gave a fee-simple conditional to *B.* (for that being a copyhold it could not be an intail, copyholds not being within the *statute de donis*) and therefore the former

Style 249.
273. Paufey
v. Lowdall.

former judgment was reversed on this new point. So in the above cited case of *Lane v. Pannel*, it is observable, that the surrender by the baron of *B.* in fee did not destroy the contingent remainder, for the legal freehold being in the lord, the surrender of the baron passed no more than he lawfully might.

Vide *supra*,
p. 238.

Again, where copyhold lands were devised to *A.* for life, remainder to his first and other sons in tail, &c. remainder to *B.* in fee, *A.* before he had any sons born, bought the reversion of *B.* and had it surrendered to his (*A.*'s) own use, thinking by that means to merge his estate for life, and so destroy the contingent remainder to his first son. But, however, it was agreed that this surrender of the reversion would not bar the son, because the freehold and inheritance were in the lord: for there is not the like inconvenience as in freehold estates at common law, in respect of contingent remainders, where there is nobody against whom to bring the *præcipe*.

Mildmay v.
Hungerford.
2 Vern. 243.

So likewise it appears, that *cestui que trust* for life cannot by feoffment or other conveyance commit a forfeiture, or destroy a contingent remainder. For though when the trust of an estate is limited to a man and the heirs of his body, with remainder over, if such tenant in tail of a trust suffer a recovery, the remainders

2 Freem. 213.
Penhay v.
Hurrel.

And vide
3 Atk. 729.

ders will be barred ; yet where tenant for life of a trust conveys in fee by feoffment or any other conveyance, it is no forfeiture of his estate, neither will it destroy a contingent remainder depending on it ; because whatever conveyance he makes, as he has not the legal estate in him, it passes only what he can lawfully grant, (*i. e.* his trust-estate for life,) and a right of entry resides in the trustees in whom the legal estate is vested. But the reason why a recovery suffered by tenant in tail of a trust, will bar the remainders, is because he is master of the estate, and may call in the legal estate when he pleaseth, and have it conveyed to the trust. But the court of Chancery will never execute the estate in law to tenant for life of a trust, to enable him to destroy the contingent remainders.

Vide Law of
Uses and
Trusts, 140.

And here we may observe, that if there be tenant for life with contingent remainder thereon depending, it seems a bargain and sale by him in fee does not destroy the contingent remainder : for it is the nature of a bargain and sale to pass no more than a man lawfully may pass ; therefore in the case now put, nothing more passes than the estate for life of the bargainor, so that the same estate continues in the bargainee, and is not destroyed or determined.

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The same reasoning seems equally applicable to a conveyance by lease and release, that being likewise an innocent conveyance disturbing no estate, but passing only what the releasor lawfully may pass. For as to the operation of the lease and release by the trustees in the case of *Mansel v. Mansel* hereafter cited, it did not depend upon the nature of the conveyance, but upon the estate of the trustees, being thereby conveyed and become merged and extinguished in the reversion and inheritance.

Vide Co. Lit.
328. a.

Infra, p. 251.

We may also remark, that there are some acts by tenant for life, which, though they amount to a forfeiture of his estate, so as to give a remainder-man title to enter if he pleaseth, yet as they devert or disturb no remainder or estate, nor make any alteration in or merger of the particular estate, do not therefore, as it seems, destroy or affect a contingent remainder, unless advantage is taken of the forfeiture by any subsequent vested remainder-man.

Thus if tenant for life accepts a fine *come ceo, &c.* from a stranger, it is undoubtedly a forfeiture, so as to intitle a remainder-man to enter, for he hereby affirms on record the reversion to be in a stranger; and yet it does not displace or devert the remainder or reversion.

Co. Lit. 252.

Vide 9 Rep.
106. b.

There-

1 Ventr. 188.
Lloyd v.
Brooking.

Therefore, where *A.* was tenant for life, remainder to his first son in tail, &c. remainder to *B.* for life, remainder to his first son in tail, &c. *A.* having a son, accepted a fine from *B.* and then made a feoffment in fee, then *B.* had issue a son, and it was resolved, that the acceptance of the fine displaced nothing; and though the feoffment displaced all the estates, yet the right of entry in the son of *A.* supported the contingent remainders.

Whether a contingent remainder is created by a conveyance at common law, or limited by way of use, the same rule holds in regard to its capacity of being destroyed.

1 Rep. 120.
Chudleigh's
case.

As where *A.* having issue *B.* and *C.* his sons, made a feoffment to the use of feoffees and their heirs during the life of *B.* remainder to the use of the first and other sons of *B.* successively in tail, remainder to the use of *C.* in tail-male, remainder to others in tail, remainder to his own right heirs; *A.* died, the feoffees enfeoffed *B.* in fee without consideration, and with notice of the said uses; afterwards *B.* had a son, and the question was, Whether the contingent remainder to him was barred by the feoffment? And it was adjudged, upon solemn argument in the Exchequer-chamber, that there being no son of *B.* to take
when

when the particular estate determined by the feoffment (which was a forfeiture) the son could never after take; for that a remainder in *use* ought to vest during the particular estate, or at least *eo instanti* it determines, as well as a remainder at common law. So if one make a feoffment in fee, or covenant to stand seised, to the use of himself for life, and afterwards to the use of his first son in tail-male, and before the birth of any son, make a feoffment in fee, such feoffment will destroy the contingent remainder to the son.

Cro. Jac. 168.
Bell's case
cited.

The reason why the feoffment in *Chudleigh's* case, though without consideration, and with notice, destroyed the contingent remainder, was, because at common law, privity of estate as well as want of notice was requisite to the standing seised to a use: that is, it was necessary that the person standing seised to a use, should have come in, *of*, or at least *under* the same estate or seisin, out of which the use was limited to arise. Now in *Chudleigh's* case, the feoffees were seised only of an estate for the life of the first son, whereas their feoffee, by force of the feoffment, came in of a greater estate; viz. a tortious fee-simple acquired by disseisin; which was neither the same estate nor yet an estate carved out of it; consequently there wanted that privity which at common law was requisite

requisite to subject him to the original uses; therefore such contingent use failed. It appears, indeed, that before the statute of uses, if the feoffees had made a feoffment with notice, their feoffee would have stood seised to the old uses; but that was, because the feoffees themselves before that statute, stood seised of the legal fee-simple, and of course their feoffee came in, either of the same estate, or of an estate derived out of that. But since the statute it is otherwise, for now the feoffees are seised of no greater estate than what is actually limited *in use* to them, the seisin being executed to the uses by the statute: from whence it follows, that when such feoffees do not take the use in fee, if they make a feoffment, their feoffee comes in neither *of*, nor *under* the estate which they were seised of, but of a new estate acquired by disseisin.

This seems to be the state of matters considered in a strict legal view; but we are to observe, that the interposition of a court of equity will make a material difference in such cases; for it seems that if at this day trustees to support contingent remainders, whether under a settlement made for valuable consideration, or voluntary, or by will, convey or join in a conveyance to destroy the contingent uses or remainders; the court of Chancery will consider it as a breach of trust. And if the purchaser
under

under such conveyance comes in for valuable consideration, and without notice; then will the remedy be against the trustees, who shall be decreed to purchase lands with their own money, equal in value to the lands sold by them, and to hold them upon the same trusts and limitations as they held the other. But if the conveyance be with notice of the uses, whether with or without consideration, in that case the purchaser shall hold the lands subject to the former trusts; thus we observe the court of Chancery for the protection of trusts, considers a purchaser from trustees with notice, as coming in privity of the same estate which the trustees themselves held; and then pursuant to the doctrine of uses when in their fiduciary state, such purchaser holds the lands subject to the same trusts, as the trustees themselves did.

Thus where *A.* devised lands to *trustees* and their heirs, to the use of his sister *D.* for her life, remainder to the use of the same trustees and their heirs during the life of *D.* in trust to preserve contingent remainders, remainder to the use of the first and other sons of *D.* successively in tail-male, remainder to *E.* in fee: after testator's death *B.* married *D.*, afterwards *B.* and *D.* his wife, together with *E.* the remainderman in fee, joined in a feoffment to (new) trustees,

Manfel v.
Manfel, 2 P.
W. 610. C11.
Temp. Talb.
252.

tees, to the use of *B.* and his heirs : and a fine was afterwards levied to the same uses ; shortly after, and before the birth of a son to *D.*, the trustees under the will, by lease and release conveyed the lands to *B.* in fee : and, upon a bill brought by the son of *D.* to have the benefit of the will of his uncle *A.* it was resolved, *1st*, That the feoffment and fine by *B.* and *D.* his wife, did not destroy the contingent remainder, because the freehold in the trustees under the will supported it. *2^{dly}*, That the lease and release by the trustees before the birth of any son to *D.* did at law destroy the contingent remainder. But as this conveyance was with notice (being to the tenant for life himself) it was held that the lands should continue liable to the same trusts as they were when the trustees joined in the conveyance, and all parties were decreed to join in making such an estate to the plaintiff as he would have been intitled to under the will of *A.* if the contingent remainder had not been destroyed ; that was, an estate-tail.

Vide supra,
p. 247.

But the court held clearly in the same case, that if tenant for life, with contingent remainders to his first and other sons, &c. depending on his estate, destroy the contingent remainders at law ; though it be a plain wrong, yet, as he is no trustee, it is no breach of trust, and therefore

And vide
1 P. W. 128.
Pye v. Gorge.

fore equity will not interfere ; for in such case
æquitas sequitur legem.

There are indeed cases, wherein the concurrence of the trustees in a conveyance to destroy contingent remainders, has been connived at by the court of Chancery ; as where upon a subsequent remainder to the right heirs, a collateral heir only has been affected by it, there having been no issue of the marriage ; for next after the parties to the marriage, the court considers the issue to be the only objects of the settlement and trusts, and pays less regard to the remainder over to the right heirs, as objects of no consideration in the settlement. As also where the application to the court for relief has been made, by one who was not at the time, nor possibly ever might be intitled to the remainder, under the words of the limitation.

Thus, where previous to and in consideration of a marriage and wife's portion, and for settling the lands in the name and blood of the husband, a settlement was made to the use of trustees for 99 years, in trust for the husband if he should so long live, remainder to trustees during his life to support contingent remainders, remainder to the first and other sons of the marriage, remainder to the heirs of the body of the husband, remainder to the right heirs

Sir Thomas
 Tippen's case
 1 P. W. 359.
 1 Eq. Abr.
 385. pl. 2.

heirs of the husband, the husband, wife and trustees afterwards by fine, &c. join in settling the lands to the use of the husband for 99 years, if he should so long live, remainder to trustees during his life to support contingent remainders, remainder to wife for life, remainder to first and other sons of the marriage, remainder over to several others; the husband and wife died without issue, and his heir claimed the lands under the first settlement, and brought his bill to have the second set aside as a breach of trust by the trustees. But Lord Chancellor held, that the remainder to the heirs of the husband was merely voluntary, and not to be aided in a court of equity, and so dismissed the bill.

Else v. Of-
burn, 1 P. W.
387. *supra* 32.

So where in the case of a settlement to the use of *A.* for 99 years, if he should so long live, remainder to trustees during his life to support contingent remainders, remainder to the use of the heirs of his body, remainder to himself in fee; *A.* having two sons, *A.* and the eldest son when of age, joined in a mortgage of the land by feoffment and fine to *B.* in fee, the eldest son died without issue, and the second son brought his bill to set aside the mortgage. Lord Chancellor was clear that this limitation to the heirs of the body of *A.* was a contingent remainder, for *nemo est hæres viventis*; and that the feoffment at law destroys the contingent remainder;

mainder; and said, that the trustees appointed to preserve the contingent remainders ought not to join in destroying these remainders, which is acting the reverse of their trust; but that after all the second son had no right to bring the bill in his father's life-time, for he neither was, nor possibly ever might be the heir of his father, unless he survived his father, which was uncertain.

There are likewise other cases where the court has actually decreed trustees to join in a conveyance to destroy contingent remainders; as where in the case of a voluntary settlement to the use of husband for life, remainder to trustees to support contingent remainders, remainder to his first and other sons in tail successively, remainder to himself in fee. The husband contracting debts, afterwards conveyed the same land to other trustees for payment of these debts. The creditors brought a bill, insisting (*inter al.*) that the trustees for preserving contingent remainders should join in the sale to destroy the contingent remainders, and (upon a precedent being shewn of such a decree) it was decreed at the Rolls, that the trustees should join to destroy the contingent remainders, and be indemnified, it being at the suit of creditors, and for raising of money for payment of debts.

Basset v.
Clapham,
1 P. W. 358.

Again,

Winnington
v. Foley,
1 P. W. 536.

Again, where lands were settled upon a marriage to the use of husband for 99 years, if he should so long live, remainder to trustees during his life to support contingent remainders, remainder to first and other sons of that marriage in tail, remainder to the first and other sons of any other marriage, remainder over; there was one son of that marriage who was then of age, the father and son, (the wife being dead) brought a bill against the heir of the surviving trustee, that he might join in making a tenant to the *præcipe*, in order to a common recovery for making a settlement upon the son's marriage, for which he was then in treaty. Lord Chancellor said, here being a vested remainder in tail, if this were for the good of the family, he did not see but that the trustee might lawfully join; but referred it to a master to see whether it were for the good of the family; who reported that it was a beneficial marriage for the family, and that it was necessary a new settlement should be made of the estate, which could not be done without a recovery.

Whereupon his Lordship observed, that it might be greatly mischievous to a family, if such a trustee should stand out; that it was plainly for the benefit of the family; for the son was going to be reduced to a tenant for life instead of a tenant in tail; so that it was a means of preserving the estate longer in the family; that the

the wife being dead, there was an end of the contingent remainders by that marriage; and as to any remainders by another marriage, no remainder not *in esse* ought to be so much regarded as this remainder in tail, which was actually vested in the son; and therefore he decreed that the trustee should join with the father and son in barring the old and making a new settlement.

But where lands were settled on the marriage of L. to the use of him for 99 years, if he should so long live, remainder to trustees during his life to preserve contingent remainders, remainder to the wife for life, remainder to the first and other sons of the marriage in tail successively: there were two sons by that marriage, and after the wife's death, the father and eldest son filed a bill against the surviving trustee to make him join in making a tenant to the *præcipe*, for suffering a recovery in order to establish a mortgage, which had been made by the father since the settlement. Lord Chancellor asked if the younger son would consent to the trustees joining as required; and upon being told he would not consent, his Lordship said, then he would not decree the trustee to join, for that he would not take away any man's right; and upon the above cited case of *Winnington v. Foley* being urged as an au-

Townsend v.
Lawton,
2 P. W. 379.

S

thority

thority for what was desired, his Lordship said, he would do so, were the like case to come before him ; that the trustee there was decreed to join, in order to *preserve* the estate in the family, but here it was desired to have the same thing done with a view only to *alien*.

But in all these cases, it is the safest way for trustees not to act without the direction of the court ; for they will do right to observe the words of Lord Chancellor in the said case of *Sir Thomas Tippen*, " That it would be a dangerous " experiment for trustees *in any case* to destroy " remainders which they were appointed by the " settlement to preserve." And it was properly observed in the above cited case of *Mansel v. Mansel*, that whatever the court have done, or may do under particular circumstances, yet they will never have it left to the discretion of a trustee to do it.

4 Leon. 237.
pl. 363.

It is generally held, that any alteration in the nature of the preceding estate before a remainder vests, will destroy that remainder. As if lands be given to *A.* in tail, and if *J. S.* come to *Westminster-Hall* such a day, remainder to *J. S.* in fee, (it has been said) that if the lands descend to two coparceners who make partition, the fee shall not accrue to *J. S.* though he should come to *Westminster-Hall*
at

at the day. And it has also been said, that if lands be given to *A.* and *B.* for the life of *C.* remainder to the right heirs of the survivor of *A.* and *B.*, and *A.* released to *B.* the remainder is destroyed.

But notwithstanding these authorities, I conceive, that the alteration in the particular estate, which will destroy a contingent remainder, must amount to an alteration in its *quantity*, and not merely in its *quality*. This opinion, I think, is warranted by two adjudged cases.

The first is that of *Lane v. Pannel* before cited, where it appears, that the severance of the jointure between two joint-tenants for life did not destroy the contingent remainder, limited after their joint-estate; for there it is adjudged, that because the remainder could not vest at the death of one of them (after the severance of the jointure), such remainder was gone as to one moiety of the lands: now this judgment was nugatory and mistaken, if the severance itself destroyed the remainder as to the whole. This, it is true, was the case of a surrender of copyhold lands: but, however, no distinction at all was taken on that ground.

1 Roll. Rep.
238. 317.
438. vide
supra, p. 46.

Lane v. Pannel.

The other case was, where lands were settled to the use of *P.* and *S.* his daughter for
S 2 their

Harrison v. Belfey.
Raym. 413.

their lives, remainder to the use of the first and other sons of *S.* in tail-male, remainder to her daughter, remainder to the heirs of *P.* *S.* afterwards, and before the birth of a son, by deed released all her right and estate to the use of *P.* and his heirs. The question was, whether the contingent remainder limited to the first son of *S.* was destroyed by her release to her father? And it was adjudged, that the release by *S.* to *P.* (*i. e.* by one joint-tenant for life to another) did not destroy the contingent remainder to her first son.

It is true, that if a lease be made to two with a condition to have fee, if they make a partition of the term, the condition is destroyed; but that turns upon a reason which does not at all affect a contingent remainder, *viz.* the requisite agreement in *quality* between the first estate and the enlargement to accrue thereupon: the enlargement must accrue in the same quality in which the estate was first granted; for that was the quality of the estate conditioned to be enlarged; and it must not differ in quality at the time of enlargement from the estate enlarged; otherwise, instead of being an enlargement or extension of the estate then in being, it would in truth be the accession of another estate of different quality, which would not be agreeable to the terms of the condition.

But

But no such necessary connection seems to exist, between a remainder and the *quality* of the preceding estate. Whilst the particular estate continues the same in *quantity*, it continues to be the same estate as far as respects its relation to a remainder. If a release or severance between joint-tenants determine the old estate, then a vested remainder-man would be intitled to enter immediately upon such release or severance; but if, notwithstanding such release or severance, it continues to be the same particular estate as to a vested remainder, why does it not as to a contingent one? No legal modification or alteration in the circumstances only of a particular estate, can be said to determine that estate: but the determination of the particular estate is the only point of connection between such estate and the remainder; therefore, until that point is passed, there still remains the same place for a contingent remainder to take effect.

It is said by Lord Chief Justice *Hale*, in the case of *Puresfoy v. Rogers*, that in all cases where the particular estate is merged in the reversion, there the contingent remainder is gone, tho' there be no divesting of any estate. As if there be tenant for life, remainder in tail in *contingency*, remainder in tail *in esse*, if the tenant for life, and he in remainder in tail *in esse*, levy a fine, this is no discontinuance nor divesting of

2 Saund. 386.

Ibid.

of any estate, because each gives such estate as he has, and yet the mean contingent remainder is destroyed.

Vide infra,
p. 270.

Puresfoy v.
Rogers.
Supra, p. 242.

Now in regard to this rule, we are to observe, that wherever the union or coalition of the particular estate and the inheritance (except the circumstance of its being created by or arising under the same instrument or deed as the estates themselves) happens by the conveyance or act of the parties, it seems the intermediate contingent remainders, depending on such particular estate, are destroyed; as in the above cited case of *Puresfoy* and *Rogers*, where the contingent remainder was destroyed by the merger of the wife's estate in the reversion. But our books apparently differ with respect to the destruction of the contingent remainder, in cases where the inheritance becomes united to the particular estate by descent.

Plunket v.
Holmes.
1 Lev. 11.
Raym. 28.

Thus in the case of *Plunket* v. *Holmes*, it was resolved, that the descent of the fee on tenant for life did not destroy the contingent remainder. The case was this; one devised lands to *T.* his eldest son for life, and if *T.* should die without issue *living at his death*, then to *L.* another of the testator's sons in fee; but if *T.* should have issue living at his death, then to the right heirs of *T.* for ever; the testator

tator died, and it was resolved, that T. was tenant for life, (because the limitation over, was not upon a dying without issue generally, but was confined to a dying without issue *then living*), with remainder in fee in contingency; and that the descent of the fee upon him, as heir at the death of his father, did not destroy the contingent remainder.

So in the case of *Boothby v. Vernon*, it was taken for granted, that the contingency was not destroyed by the descent of the fee. A. devised lands to his sister, who was his heir at law, and her assigns for her life, and if she should marry, and have issue male of her body living at the time of her death, then to such issue-male and his heirs male for ever; but if she should leave no issue-male at her death, then to G. and his heirs for ever. The question respected the title of the testator's sister's husband, to be tenant by the curtesy of the lands so devised to her; and the court held, that the inheritance was never executed in possession in the sister during her life, (notwithstanding the inheritance descended on her) and therefore her husband could not be tenant by the curtesy; it follows, that the descent of the fee did not merge her estate for life, or destroy the contingency. So in *Archer's case*, notwithstanding the reversion in

Boothby v.
Vernon.
9 Mod. 147.

Archer's case,
3 Rep. 66.
Supra, p. 241.

in fee must have descended on *Robert* the devisee for life, upon the death of his father, the testator, yet he was adjudged to be only tenant for life, with contingent remainder to his next heir-male.

Wood v. Ingersole.
Cro. Jac. 260.

On the other hand, in the case of *Wood v. Ingersole*, it is said to have been resolved, that the descent of the fee on tenant for life destroyed the contingent remainder; in that case it is said, three distinct parcels of land were severally devised by the testator to his three sons, and that if either of them should die, the *other surviving should be his heir*; the eldest son died; and the reporter says, it was adjudged, that the fee descending on the eldest son at the father's death, had merged the freehold devised to him, and destroyed the contingent remainder. But there appears to have been a notable mistake in this report, both as to the state of the case, and as to the judgment; for it seems the words on the roll are, *and if any of my sons die, the ONE to be the other's heir*; which words were adjudged void for uncertainty, for there were two survivors, and consequently the above point did not come into question. As to the case of *Fortescue v. Abbot*, the remainder there was adjudged to be vested, and therefore the decision in that case does not affect the present point.

1 Bulst. 61.
in the same
case.

T. Jones, 79.
Pollex. 481.
in the case of
Fortescue v.
Abbot.

Vide supra,
p. 170.

But

But in the case of *Kent v. Harpool*, which as T. Jones, 76. to the point in question was this: *A.* the father being tenant for life, remainder to his son *B.* for life, remainder to the first son of *B.* remainder to the heirs of the body of *A.*; *A.* died before any son was born to *B.*; the court held the contingent remainder to the first son of *B.* was destroyed by the descent of the estate tail on *B.* Of the same opinion was Lord *Hardwicke* in the case of *Hooker v. Hooker*, where lands were conveyed to the use of *A.* and his wife for life, remainder to the use of *B.* the son of *A.* for his life, remainder to the first and other sons of *B.* in tail, remainder to his daughters in tail, remainder to *A.* in fee; *A.* and his wife died in the life-time of *B.* who afterwards died without issue, leaving a wife; the question was, Whether the wife of *B.* was intitled to dower in the lands? And it was decreed she was; and Lord Chancellor, with one of the Judges, was of opinion, that the estate for life in *B.* was merged by the descent of the inheritance upon him, and the contingent remainder destroyed.

77.
1 Vent. 306.

Hooker v.
Hooker.
Rep. Temp.
Hardw. 13.

These seeming differences in opinion, I apprehend, may be reconciled by a distinction between those cases, where the descent of the inheritance is *immediate* from the person by whose will the particular estate and contingent

gent remainders were limited, and the cases where those estates were *not* created by the will of the ancestor from whom the inheritance *immediately* descends on the particular estate; which happens either in the case of a *mediate* descent from the person who devised the particular estate and contingent remainders, or else where those estates were not created by the will of any person, from whom the descent of the inheritance is derived. *Archer's* case and the cases of *Plunket v. Holmes*, *Boothby v. Vernon*, are instances of the first sort. And if in the case of *Boothby v. Vernon*, we suppose the devisor to have left a son, and that afterwards that son died without issue in the lifetime of the sister, to whom the particular estate was devised; in that case, the inheritance would first have descended from the devisor to his son, and from him to the sister, and consequently the descent of it on the particular estate of the sister, would not have been *immediate* from the devisor; and in such case, I apprehend the descent would have merged her particular estate, and the inheritance would thereby have been executed in her in possession, and consequently that the contingent remainder would have been destroyed, (for the reasons hereafter given.) The third sort is instanced in the cases of *Kent* and *Harpool*, and *Hooker* and *Hooker*.

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The reasons upon which I ground the above distinction are these : wherever a testator limits a contingent remainder, it is agreed, that the inheritance descends to the heir only till the contingency happens; if so, nothing can be more absurd than to make such descent destroy the contingency. The will does not operate till the testator's death; the descent takes effect at the same time; so that, under such a construction, the particular estate given to the heir by the will arises and is destroyed in one and the same instant; and how is it destroyed? By the descent which that very same will permitted. This would be making a will and no will at the same time, and would, in effect, be saying; that a limitation of a particular estate in a will to a testator's heir at law, with a contingent remainder over, must be void in its creation, as being incapable of ever taking effect. For it is evident, that under such a construction, the particular estate never can take effect at all, its existence and destruction commencing together; and *that* being destroyed, the contingent remainder over is also gone before it has even a moment's chance for existence. Now this would be making the will *ipso facto* void.

That estates created by devise, should be liable to the operation of future accidents, as much as if they had been created by any other instrument,

instrument, or conveyance whatsoever, appears but reasonable; for the nature of the same kind of estate when once created, is the same, whatever might have been the mode of its creation. But that is no reason at all, for rendering the limitations void in their very creation, and denying them even the possibility of ever taking effect. The general construction of wills forbids this, by giving effect to the testator's intention, so far as it can be done consistently with the established rules of law. And when in the case of a contingent remainder by devise, the law supposeth the fee to descend to the heir, until, or in default of, the contingency; it surely can be no violation of that law, to consider such descent as conditional and imperfect, where the giving it the force and effect of an absolute and perfect descent, would render the will originally and totally abortive. And therefore it seems to have been rightly said by *Wyndham*, and agreed by all the court, in the case of *Plunket v. Holmes*, that until the contingency happens, the fee *descends* to the heir in *some sort*, but not to confound the estate for life, but so as to leave an opening for the interposition of the remainders, when they happen to interpose between the estate for life and the fee.

Vide Raym.
28.

But where the descent of the inheritance on the particular estate, is not *immediate* from the person

person whose will created the particular estate and remainder, or where the descent of the inheritance is otherwise clear of the first-mentioned circumstances, there can be no such inconsistency in supposing the contingency to be destroyed by the descent; for in all such cases the particular estate is created, and takes effect with a capacity of being afterwards destroyed by those accidents, to which the nature of such an estate is generally subject, such as forfeiture, merger, &c. its immediate destruction is not necessarily involved in the mode of its creation, as it must be in the former case under the same construction. There can be no necessity, therefore, to exempt the particular estate in these cases, from the operation of merger by the descent, in order to give such particular estate an existence, as there is in the former case.

In the first case we observed the limitations could never possibly take effect, if the descent of the inheritance were allowed to merge the particular estate; in the latter cases they may take effect though the descent of the fee be allowed its full force and operation; and when the particular estate has once taken effect, there is no more reason why it should be exempt from those accidental modes of destruction, to which the law subjects estates of the same
nature

nature in general; than there is in any other case, where the particular estate is merged, and a contingent remainder destroyed, by the accession of the inheritance: therefore in the latter cases the descent may well be allowed its full and usual operation.

Here we must remark a distinction between the cases where a particular estate is limited, with a contingent remainder over, and afterwards the inheritance is subjoined to the particular estate by the same conveyance; and those cases wherein the accession of the inheritance is by a conveyance, accident or circumstance, distinct from that conveyance which created the particular estate. In the latter cases we have seen the contingent remainder is generally destroyed; in the former it is otherwise. For where by the same conveyance a particular estate is first limited to a person with a contingent remainder over to another, with such a reversion or remainder to the first person, as would in its own nature drown the particular estate first given him; this last limitation shall be considered as executed only *sub modo*, that is, upon such condition, as to open and separate itself from the first estate, when the condition happens; and by no means to destroy or preclude the contingent estate.

Vide supra,
p. 27.

But

But whether, in case of a limitation to one for life, remainder to his first and other sons, &c. remainder to the heirs, &c. of tenant for life; this last limitation is so executed in him as to intitle his wife to dower upon the husband's decease, has been a question.

For in the case of a devise to *A.* for life, remainder to his first son in tail, and so to his second, remainder to the heirs of the body of *A.*; it was resolved, that the possibility of the mean estate that might interpose, kept the remainder in tail during *A.*'s life so disjoined from his immediate freehold, that his wife could not be endowed.

C. o. Eliz.
315.
Cordal's case.

On the other hand, in the above cited case of *Hooker v. Hooker*, Lord *Hardwicke* with three of the Judges held, that even supposing after the descent of the fee upon *B.* there remained any possibility of the estate's opening to let in the contingent remainders, yet as the contingency had never happened, (and the husband being dead) never could happen, the wife should be intitled to dower, and he did not think that *Cordal's* case was law; and said it was denied, 1 *Sand.* 336. and also in another like case by *Bridgman*.

Vide supra,
p. 265.

In another case indeed, where *W.* was tenant for life, remainder to *J. S.* and his heirs for

Duncomb v. Duncomb.
3 Lev. 437.

for the life of *W.* remainder to the heirs of the body of *W.* remainder over; *W.* died without issue, leaving a wife; the question was, whether she was intitled to dower or not, *i. e.* whether the remainder in *J. S.* was such an interposing estate between *W.*'s estate for life and his remainder in tail, as to prevent her being dowable; and though it was contended that the intail was executed in him, and that the remainder to *J. S.* and his heirs during his life, was only a possibility; yet the court upon the first argument adjudged the wife was not dowable. For we are to observe, this remainder to *J. S.* was an intervening vested estate, and not a possibility, as appears from what has been said in a preceding page: and this case was allowed to be good law by Lord *Hardwicke* in the above cited case of *Hooker v. Hooker*.

Vide *supra*,
p. 152.

Supra, p. 240.

I observed in a preceding page, that notwithstanding the particular estate might in some cases be revived, yet that the contingent remainder, if once it has failed for want of the existence of the preceding estate when the contingency happened, shall never after arise. As if there be tenant for life with contingent remainder over; tenant for life makes a feoffment in fee upon condition; if the contingency happens before the condition is broken, the remainder is destroyed, notwithstanding the
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the tenant for life afterward enters for condition broken. But, however, if the tenant for life enters for the condition broken before the contingency happens, the contingent remainder may vest. But in that case, if the reversioner enter for the forfeiture, before the contingency happens, then is the contingent remainder destroyed—*Per Holt* Chief Justice.

2 Salk. 577.
1 Ld. Raym.
314.

As to the remainder's vesting, if the tenant for life enters before the contingency happens, there is a contrary opinion delivered in *Bacon's Abridgment*: where it is said the contingent remainder shall never arise, though the condition be broken, and a re-entry made before the contingency happens; because the feoffment, though upon condition, was a forfeiture and determination of the particular estate, and the recovery does not purge the forfeiture. Whether this was the opinion of Chief Baron *Gilbert* (from whose manuscript the greater part of that abridgment is supposed to have been compiled) does not appear. The authority there cited, certainly does not warrant so much. But, however, the ground of the opinion is evidently this; that notwithstanding the re-entry of tenant for life, the forfeiture still remains; now, it may be asked, if the estate still continues forfeited, how can it be supposed to subsist any more after the re-entry, than immedi-

Bac. Abridg.
v. 4. p. 315.

Vide 1 Inst.
252. a.

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ately after the feoffment from which the forfeiture commences? And where then is there a particular estate in the one case to support the contingent remainder, any more than in the other?

1 Inst. 202. b.
1 Roll. Abr.
474. P. d. pl.
4. 5.

Vide *supra*,
p. 247.

39 Affis. pl.
15. 4 H. 6.
page 15. b.

But notwithstanding this reasoning, it seems upon the whole, that Lord Ch. Justice *Holt's* opinion is agreeable to law: for both Lord *Coke* and *Roll* tell us; that if lessee for life make a feoffment upon condition, and afterwards enter for breach of the condition, it will reduce the reversion to the lessor, and the estate for life will be restored; though still subject to the entry of lessor for the forfeiture, just in the same manner indeed as where the forfeiture is committed by acceptance of a fine, &c. from a stranger, and no divesting of the remainder, or alteration of the particular estate occasioned thereby. And though most of the authorities cited by Lord *Coke* from the year books, as well as the reference of *Roll* to the same books, do not apply to the point; yet that must be ascribed to some errors in the print; for I find two cases in the year books (one indeed cited by Lord *Coke*) where that point is laid down *arguendo* on one side, and admitted by the other side: from whence it seems, that after re-entry for condition broken, the lessee for life is tenant for life again, so long as the lessor does not enter upon him for the forfeiture; and consequently if the

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contingency happen during that interval, the contingent remainder may well vest.

Before I conclude this tract of contingent remainders, I shall take notice of two or three circumstances relating to them, which could not so properly be brought in under any of the foregoing heads. First, it seems that where a remainder is limited in contingency, the fee in the mean time (but subject to the contingency) remains in the grantor and his heirs, until the contingency happens; for where a contingent remainder fails, it is held that the donor shall have the land again. As if there be tenant for life or in tail, remainder to the right heirs of J. S., and tenant for life dies, or tenant in tail dies without issue, living J. S., here the remainder is void, because J. S. cannot have heir during his life; and as it does not take effect during the particular estate, it shall never take effect, though he afterwards dies and has an heir; and in this case, as the remainder cannot take effect, the donor shall have the land again.

2 Roll. Abr.
418. pl. 1, 2.

Now this amounts in effect to saying, that until the contingency happens, the remainder of the estate, which is to vest upon such contingency, is not absolutely out of the donor; but that such an interest remains in him till the remainder vests, as intitles him or his heirs to

enter and retain the lands, if the contingent remainder fails or is destroyed.

Beck's case,
alias Burton
v. Nichols.
Lit. Rep. 159.
253. 285.
315. 344.
Cro. Car. 363.

And therefore in the case last put, it seems by the better opinion, that if the tenant for life make a feoffment in the life of *J. S.* and before the remainder vests, as this feoffment determines the particular estate, and consequently destroys the remainder then contingent, the donor or his heirs may enter for the forfeiture; as was held by *Hutton* and *Yelverton* in their arguments in *Beck's case*; where, upon a feoffment to the use of *B.* for life, remainder to *J.* for life, remainder to the first son begotten of the body of *J.* that should have heirs-male of his body, and to his heirs *in perpetuum*, and in default of such issue of his body, to the first daughter and daughters which should have issue begotten of her body, and for default of such issue, remainder to the right heirs of *J.*; *J.* levied a fine before he had a son that had issue-male, upon which the heir of *B.* entered for the forfeiture.

Two points arose in this case; first, whether the limitation to the first son of *J.* who should have any heirs-male of his body, &c. was a contingent estate-tail or in fee? And if it were in fee, then secondly, as it was contended that the subsequent limitation to the right heirs of *J.* must in that case be contingent, (no subsequent limitation

limitation being capable of vesting after a contingent fee limited before) whether the fee remained in the feoffor and his heirs in the mean time, so as to intitle the heir to enter for the forfeiture? *Hutton* and *Telverton* inclined to the opinion, that if the remainder to the right heirs of *J.* was contingent, so that no remainder vested at the time of the fine, the right heir of the feoffor might enter; and they agreed as to the right of entry of the feoffor or his heir, upon the feoffment of tenant for life in the case I have above-mentioned; though *Croke* put a case to the contrary, which *Telverton* denied to be law; and they said that in case of a feoffment to the use of one for life, remainder to another in tail when he marries the daughter of the feoffor, if tenant for life makes a feoffment before such marriage, the feoffor may enter. However, the court after several arguments decided the case on the first point; and agreed that the limitation to the first son, &c. of *J.* gave such first son only an estate tail; and consequently, that the subsequent remainder to the heirs of *J.* then became vested in him; according to the general rule before treated of in this essay, and the doctrine established in the case of *Loddington v. Kime*, that a remainder to a person *in esse*, (as that to the heirs of *J.* here was, it being a remainder in him, as he took a preceding life estate) may vest, if the preceding

Vide *supra*,
p. 161.

And *infra*
295 *Doe v.*
Reason.

Supra, p. 21.

Supra, p. 161.
and *Doe v.*
Holmes.
infra, p. 293.

preceding contingent remainder be not in fee ; and therefore the court came to no resolution as to the latter point, though the opinion of *Hutton* and *Yelverton* appears to have been as I have mentioned.

Carth. 262.

And *Holt* Ch. Justice was of the same opinion, when in the case of *Davis v. Speed*, he said, that where a feoffment is made to the use of *A.* in tail, remainder to the use of the right heirs of *T. S.* who is then living, the fee-simple is not in abeyance, nor in the feoffees, but results to the feoffor and remains in him, till the contingency, (*viz.*) the death of *T. S.* happens.

1 P. W. 505.
Infra, p. 281.

And indeed in the case of *Carter v. Barnardiston*, the Master of the Rolls, though he was arguing against the notion of the fee's descending (in that case at least) to the heir at law of the testator, till the contingency happens, yet admitted, that where one devises lands to *A.* for life, remainder to the right heirs of *J. S.* then living, though the remainder in fee is in abeyance, yet there is a possibility left in the heir ; and that this was plain even in the case of a grant ; and that this possibility seemed such an interest as intitled the donor to enter for the forfeiture made by tenant for life ; for that his estate was as much determined as it would have been by his death ; and that it was absurd that

that a tenant for life by an unlawful act, *viz.* by his destroying the contingent remainder, should gain to himself an indefeasible fee-simple; that it was like the possibility that was upon a grant at common law to a man and the heirs of his body: for there though the grantor had no reversion, yet he might enter when the grantee died without issue.

So where a remainder is devised in contingency, the fee in the mean time descends to the heir till the contingency happens; as where *A.* devised lands to *B.* his eldest son for life, and if *B.* should die without issue living at his death, that then the same should remain to *C.* in fee; but if *B.* should have issue living at his death, then the fee should remain to the right heirs of *B.*; it was resolved that *B.* took an estate for life, with remainder in fee in contingency; and it was said by *Windham* and *Twisden*, and agreed by the other Judges, that the fee descended to *B.* as heir, till the contingency happened, tho' not so as to confound his estate for life, and was not in abeyance; that in relation to *C.* *B.* took only an estate for life; but in the mean time, by operation of law, he had the fee in such sort, as that there should be an *hiatus* to let in the contingency, when it happened. And that in *Archer's* case, though

Raym. 28.
Plunkett v.
Holmes.
Supra, p. 262.

1 Rep. 66.
Vide supra,
p. 102. 241.

Robert

Robert took an estate only for life by the will, yet by operation of law he had the fee also.

Purefoy v.
Rogers.
2 *Sanders* 380.
and vide *supra*, 242.

So in the above cited case of *Purefoy* and *Rogers*, where *S.* devised lands to his wife for life, and if it should please God to bless her with a son, and she should call that son by the testator's christian and surname, he gave the inheritance of the lands to him after his mother's life, and if he died before he came to twenty-one, then the testator gave the inheritance of his lands after his wife's life to his the testator's heirs for ever. Before any son was born, the heir of the testator conveyed the estate to the wife and her second husband by fine—*Saunders* urged, that the contingent remainder to the son was not destroyed, for that at the time of the fine, the heir of the testator had no reversion or estate in him: for that an estate for life was devised to the wife and the remainder in fee was devised to her son upon a contingency; so that until it could be known whether such contingency would happen or not, the reversion must be in abeyance and not in the heir; and then his conveyance gave no estate to the husband and wife, but they were only tenants for life of the wife as before. But *Hale* Ch. Justice interrupted him, and said it was clear that the reversion was in the heir of the testator by descent, and not in abeyance; and accordingly it was adjudged,

ed, that the contingent remainder was destroyed.

So where *A.* devised to *C.* for life, and in case *C.* should have issue-male, then to such issue-male and his heirs for ever, and after the death of *C.* in case he should leave no issue-male, then to *D.* in fee. After the testator's decease, *C.* before he had any issue, suffered a common recovery of the lands; it was clearly held, that these remainders after the death of *C.* were contingent, and consequently barred by the recovery of *C.* before they vested; and then the question arose, whether the remainder in fee was in abeyance or did descend to the testator's heir at law? The Master of the Rolls considered the fee as in abeyance. But upon an appeal to Lord Chancellor *Parker*, he made a point of reprobating and exposing that notion; and held, that nothing but necessity could, in any case, support the admission of it; that there could be no other reasonable pretence for it, but to preserve the remainder; but he said, the construing the fee to be in abeyance, would on the contrary tend to the destruction of the remainder; that it was held, where the remainder was devised in contingency, the reversion in fee descended to the heir at law in the mean time; and that whatsoever estate was not disposed of by the testator,

1 P. W. 505.
Carter v.
Barnardiston.

tator, descended to the heir; and he said, he should abide by that opinion, and was very clear in it. — That it was a strange construction to take pains, by a strain in law, to place a remainder *in nubibus* or in abeyance, on purpose that the testator's intention should be wholly frustrated, and that the tenant for life might be under the temptation to disappoint the will, by destroying the contingent remainder by a recovery or feoffment; which in such case must be admitted to be tortious conveyances; nay, what was still more extraordinary, that the tenant for life must be rewarded for this wrong; and that he who before had but an estate for life, should gain an absolute and indefeasible fee-simple, and this by doing a wrongful act; which would be taking advantage of his own wrong, both against law and reason. — That upon the recovery suffered by C. he being but tenant for life, the co-heirs of the testator having the reversion in fee descended to them, they had a right of entry commencing upon such forfeiture of C.

Loddington
v. Kime.
1 Salk 224
1 Ld. Raym.
209.
Vide supra,
p. 160.

So the court of Common Pleas, upon the same case referred to them out of Chancery, were clear as to the destruction of the contingent remainders by the recovery suffered by C. and that he thereby gained a tortious fee, good against all persons **BUT** the right heirs
of

of the testator; which was admitting that a right descended to them.

Indeed in both the above cited cases of *Wood v. Ingersole*, and *Fortescue v. Abbot*, this doctrine, respecting the descent of the fee to the heir at law, seems to have been clearly admitted.

And Vide also
10 Rep. 85.
b. Leonard
Lovie's case.

It may indeed be said, that in a subsequent case Lord *Talbot* does not seem to have adverted to this point: where lands were devised to two trustees and the survivor of them, and the heirs of such survivor, in *trust to sell*; upon its being objected, that the parties could not make a good title, because the fee was not in the trustees, but was limited to the survivor, and it was uncertain who would be the survivor, his Lordship held that the trustees joining in a fine would pass a good title to the trustees by way of estoppel; that here the fee was in abeyance, and it was certain that one of these two trustees must be the survivor, and intitled to this future interest, and consequently his heirs would be barred by the fine of their ancestor.—And it being said by the counsel that the heir of the devisor would join in the conveyance; his Lordship observed, that the heir's joining would supply the want of proving the will, but that in every other respect it would be void. And afterwards his Lord-

Vick v. Edwards.
3 P. W. 372.

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Vide infra,
p. 287.

ship cited the case of *Weale v. Lower*, where a fine was adjudged to pass an estate not vested, by way of estoppel.

Now upon this case three material observations arise; first, that as the heir at law agreed to join, the question respecting the necessity of his concurrence was not debated; secondly, that in the case of *Weale v. Lower*, the fine was levied by the remainder-man, and did not at all affect the particular estate; whereas in the principal case the question would have been, whether the fine of the trustees, being tenants for life, would not have destroyed the contingent remainder in fee to the survivor; and thereupon have given the heir of the testator a right of entry for the forfeiture, agreeable to the doctrine held in the above cited case of *Carter v. Barnardiston*; thirdly, that the devise here being to the trustees in trust to sell, would have carried, by nature of the trust itself, such an estate as should enable the trustees to perform the trust, by disposing of the fee, in exclusion of the heir at law; even if the devise to them had been indefinite, without any words of limitation at all, either to the survivor or the heirs, &c.: and then how can we consider these words of limitation (plainly intended to give the fee expressly, and to carry the same to the survivor and his heirs) otherwise

otherwise than as words of surplusage, that could not abridge the estate which would have passed without them, and which they were meant expressly to establish; nor deprive the trustees of the power of executing that very trust, for which the estates were expressly devised to them; and which power those unnecessary words were intended to promote and facilitate?

Upon the whole, therefore, it does not appear, that the case of *Vick v. Edwards* can be relied on as an authority, against that doctrine, relating to the descent of the fee till the contingency happens, which seems to have been so directly and fully established by the several cases I have examined in regard to it; and which is confirmed by many other cases cited in the sequel of this essay.

Vide infra,
Goodright
v. Searle.

To put this doctrine to the test of reason, it seems to stand thus: a man makes a disposition of a remainder or future interest, which is to take no effect until a future event comes to pass; it is clear no interest passes by such a disposition before the event takes place; what then becomes of the intermediate reversionary interest from the time of the making the disposition till the event happens, upon which the disposition is to take effect? It was in the grantor or testator at the time of making such disposition;

on; he has done nothing to depart with it before the time limited for that disposition to take effect; the natural conclusion seems to be, that it remains where it was, *viz.* in the grantor or the testator and his heirs, for want of being departed with to any body else. When the future contingent disposition takes effect, then the reversionary or future interest passes pursuant to the terms of the original disposition: but if such future or contingent interest fails of effect, either by reason of the destruction of the particular estate, or otherwise, what is there then to draw it out of the grantor or his heirs, or the heirs of the testator? Or who can derive title to an estate under or by virtue of a disposition, which confessedly fails or is precluded from ever taking effect at all?

Pollexf. 54.
Weale and
Lower.

1 Rep. 99. a.
Wood's case
there cited.
And vide
same case in-
fra.

Another observation is, that a contingent remainder of inheritance is transmissible to the heirs of the person to whom it is limited, if such person chance to die before the contingency happens; this appears in the preceding case. The same law, it seems, holds with respect to future uses, as where *A.* seised of the manor of *S.* covenanted with another, that when *J. S.* should enfeoff him of the manor of *D.* that he would stand seised of the manor of *S.* to the use of the covenantee and his heirs. The covenantee died, *J. S.* enfeoffed the
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the covenantor, and the heir of the covenantee was adjudged to be in, in course and nature of a descent. And in general it seems, that contingent interests pass to the real or personal representatives, according to the nature of such interests, as well as vested interests, so as to intitle such representatives to them when the contingencies happen.

Vide Vin. v.
8. p. 112.
ca. 38. Gurnel v. Wood.
1 Vezey, 47.
237.

But however we are to remember, a contingent remainder may, before it vests, be passed by fine by way of estoppel, so as to bind the interest which shall afterwards accrue by the contingency. As where *A.* made a feoffment to the use of himself for life, and after the death of himself and *M.* his wife, to the use of *B.* (his eldest son) for life, and after the death of *A.* *M.* and *B.* to the use of *B.* and the heirs-male of his body, and for default of such issue, to the use of the heirs of *B.*; *B.* had issue a daughter, and then by fine and indenture granted to *D.* for 500 years, to commence after the death of *A.*; *B.* died, *M.* died, *A.* survived; it was held that the estate limited to *B.* was a contingent remainder: for the particular estate was only for the life of *A.* whereas *B.*'s estate was not to commence till after the death of *A.* and *M.* and though *B.* levied the fine for 500 years and died, before the contingency happened; yet his

Moor 554.
pl. 750.
Pollex. 54.
Weale v.
Lower.

Vide supra,
p. 229.

his heir afterwards, when the contingency happened, was bound by the fine, and the lease for 500 years to *D.* took place; for it was agreed that the contingent remainder descended to his heir; that the fine operated at the beginning by conclusion, and passed no interest, yet the estoppel should bind the heir; that upon the contingency the estate by estoppel became an estate in interest, of the same effect as if the contingency had happened before the fine was levied; that if the fine had been in fee, it would have barred the heir, and operated to the benefit of the possession, as the fine of a disseisee to a stranger: but being only for years, the fee was vested, and the term good, being drawn out of the fee.

The same point, as I have already observed, was established in the case of *Vick v. Edwards*, though Lord *Talbot* did not seem to advert to the circumstance of the fine's being levied by the person who had the particular estate for life, as well as the contingent remainder; and consequently destroying that contingent remainder, instead of merely passing it by estoppel. But for the reasons I have above noticed, the heir appears in that case to have been excluded at all events.

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That a contingent remainder cannot be passed or transferred before the contingency happens, otherwise than by way of estoppel by fine (or possibly by a common recovery, wherein the person intitled to the contingent estate comes in as vouchee, agreeable to the opinion delivered by the court in *Pells v. Brown's* case, though Mr. *Piggot* makes a *quære* upon it) appears by the above cited cases of *Veale v. Lower*, and *Vick v. Edwards*.

Pells v. Brown.
2 Cro. 592.
and infra.
And vide
Pigg. Com. Recov. 132.
but vide
Wright v. Wright infra.

And that such contingent estates are not devisable by the person intitled thereto, whilst they remain contingent, may be seen in the case of *Bishop v. Fountain*: where *A.* devised land to a trustee and his heirs, in trust in the first place for payment of debts, then to pay an annuity to his (the testator's) natural daughter *M.* for life, and if she had any children, to convey successively to those children, and for want of such issue, or if such issue die without issue, then to be conveyed to *C.* and his heirs; and the testator gave *C.* an annuity till such estate should come to him, and if he claimed any thing during the life of *M.* or any of her issue, then he was to be excluded having any thing out of the estate.

Bishop v. Fountain.
3 Lev. 427.

C. died, leaving a son *J.*, who during the life-time of *M.* devised the lands and died. *M.* afterwards died without issue. The heir

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his heir afterwards, when the contingency happened, was bound by the fine, and the lease for 500 years to *D.* took place; for it was agreed that the contingent remainder descended to his heir; that the fine operated at the beginning by conclusion, and passed no interest, yet the estoppel should bind the heir; that upon the contingency the estate by estoppel became an estate in interest, of the same effect as if the contingency had happened before the fine was levied; that if the fine had been in fee, it would have barred the heir, and operated to the benefit of the possession, as the fine of a disseisee to a stranger: but being only for years, the fee was vested, and the term good, being drawn out of the fee.

The same point, as I have already observed, was established in the case of *Vick v. Edwards*, though Lord *Talbot* did not seem to advert to the circumstance of the fine's being levied by the person who had the particular estate for life, as well as the contingent remainder; and consequently destroying that contingent remainder, instead of merely passing it by estoppel. But for the reasons I have above noticed, the heir appears in that case to have been excluded at all events.

That

That a contingent remainder cannot be passed or transferred before the contingency happens, otherwise than by way of estoppel by fine (or possibly by a common recovery, where- in the person intitled to the contingent estate comes in as vouchee, agreeable to the opinion delivered by the court in *Pells v. Brown's* case, though Mr. *Piggot* makes a *quære* upon it) appears by the above cited cases of *Veale v. Lower*, and *Vick v. Edwards*.

Pells v. Brown.
2 Cro. 592.
and infra.
And vide
Pigg. Com. Recov. 132.
but vide
Wright v. Wright infra.

And that such contingent estates are not devisable by the person intitled thereto, whilst they remain contingent, may be seen in the case of *Bishop v. Fountain*: where *A.* devised land to a trustee and his heirs, in trust in the first place for payment of debts, then to pay an annuity to his (the testator's) natural daughter *M.* for life, and if she had any children, to convey successively to those children, and for want of such issue, or if such issue die without issue, then to be conveyed to *C.* and his heirs; and the testator gave *C.* an annuity till such estate should come to him, and *if he claimed any thing during the life of M. or any of her issue, then he was to be excluded having any thing out of the estate.*

Bishop v. Fountain.
3 Lev. 427.

C. died, leaving a son *J.*, who during the life-time of *M.* devised the lands and died. *M.* afterwards died without issue. The heir

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of the trustee thereupon conveyed the lands to the heirs of *C.*; upon which the devisee of *J.* brought a bill to have the lands conveyed to him, supposing an equitable estate to have been vested in *C.*, and consequently that it was well devised by *J.* the son and heir of *C.* But it was resolved, it seems, by the Lord Keeper, with the assistance of Ch. Justice *Treby* and Baron *Powell*, after many arguments, that *J.* had no estate devisable, but a mere possibility during the life of *M.* or any of her issue; and so the devise by him was void, and the lands well conveyed to the heirs of *C.*

The reasons upon which the estate devised to *C.* was held a mere possibility during the life of *M.* or any of her issue, are not stated or mentioned; but probably this resolution was grounded on the clause which excluded *C.* from having any thing out of the estate, if he claimed any thing during the life-time of *M.* or any of her issue; which clause possibly was considered as rendering the devise to *C.* dependent upon the condition of his not claiming during the life of *M.* or any of her issue, and consequently, contingent until that condition was performed; which could not be until the decease of *M.* without issue.

Unless we recur to some reason of this nature, for suspecting the effect of the devise to *C.*

C. in that case, it should seem that he would have taken the equitable remainder in fee, expectant on the decease of M. and the failure of issue of her body; which would have been a *vested* estate, and consequently devisable.

Vide 9 Rep.
127. Sunday's
case, and
2 Vez. 610.
Southby v.
Stonehouse.

Indeed, in regard to contingent remainders and other contingent interests in lands, amounting to estates of freehold, if we consider that the persons intitled to them are not seised of the lands by virtue thereof before such interests become vested, it seems to follow that they cannot pass by a will made before they become vested, any more than lands acquired after the making of the will.—As to contingent interests in chattels or personal estates, the same reasoning does not apply to them, and therefore they are devisable, as well as assignable in equity, as shall be noticed hereafter.

And it is further to be observed with respect to contingent remainders, (what indeed is but an inference from the observations I have already made upon the definition of a remainder) that a fee cannot be limited on a fee; as if lands are limited to one and his heirs, and if he dies without heirs, that it shall remain over to another; this last limitation is void. So if lands are given to one

1 Eq. Abr.
186. c. 11.

Vide supra,
p. 18.

1 Eq. Abr.
186. c. 3.

and his heirs, so long as *J. S.* has issue, and after the death of *J. S.* without issue, to remain over to another; this remainder is likewise void, because the first devisee had a fee, though it was a base and determinable fee.— So where one devised lands to the prior and convent of *B.* so that they paid annually to the Dean and Chapter of *St. Paul's* fourteen marks, and if they failed of payment, that their estate should cease, and that the said dean and chapter and their successors should have it; it was held that this limitation over was void, because as the first devise carried a fee, nothing remained to be disposed of; and executory devises after a fee simple were in former ages unknown.

1 Eq. Abr.
186 c. 2.

At this day indeed, in a will, such limitations may be good upon a contingency that may happen within a reasonable period; tho' this not by way of direct remainder, but by way of executory devise.

However, we are to remember, that although a fee cannot, in conveyances at common law, be mounted on a fee; yet two or more several contingent fees may be limited concurrently, so as to be substitutes or alternatives one for the other, and not to interfere; but so that one only is to take effect, and every subsequent limitation is only a disposition substituted

stituted in the room of the others upon the event of their failing. Thus in the above cited case of *Loddington v. Kime* it was held, that the first remainder was a contingent remainder in fee to the issue of *A.* and the remainder to *B.* was also a contingent fee, not contrary to, but concurrent with the former; and it was a contingency with a double aspect. For if *A.* had issue-male, the remainder vested in that issue in fee, if he had no issue-male, then it vested in *B.* in fee; and these were remainders not expectant upon, and the one to take effect after the other, but were cotemporary; the one to take effect in lieu of the other, if that failed.

Loddington v. Kime.
Supra, p. 161,
1 L.d. Raym.
208.

So in a late case, where the testator devised lands to his son *J. L.* with *impeachment of waste*, for and during the term of his natural life, and from and after his decease, he devised them unto *the heirs male or female lawfully to be begotten of the body of his son J. L. for ever*, they paying out of the same a sum of 400 l., 200 l. part thereof to *E. B.*, which legacy he willed should be paid within two years after the death of his son *J. L.*, and upon neglect of payment, he devised the lands to *E. B.* and her heirs, to hold for such a term of years, as the said sum might be raised out of the rents and profits thereof. And afterwards that the land should return into the

Doe v. Holmes,
3 Will. 237.
241.

the possession and for the sole use of the *heir-male* or *female* lawfully begotten by his said son, and to his and her *heirs for ever*. But if his said son *J. L.* should die, *leaving* no lawful issue, he then gave the lands to *E. B.* her heirs and assigns for ever. *J. L.*, after the testator's decease, suffered a recovery to the use of himself in fee, and died without leaving or ever having had any issue.

The question was, whether the remainder to *E. B.* was barred by this recovery? It was contended that it was not; for that *J. L.* took only an estate for life, with contingent remainder in tail to his issue, with a vested remainder in fee to *E. B.*; in which case *J. L.* being only tenant for life, could not by his recovery bar such vested remainder.

We are to observe, it was necessary to contend that the limitation to the heirs-male or female, &c. of *J. L.*, was a *contingent* remainder, and did not *vest* in *J. L.*, and also that it gave a remainder in *tail* only to such issue, and not in *fee*; for if this limitation vested an estate-tail in *J. L.* then his recovery indisputably barred the remainder to *E. F.*; and if it gave a contingent remainder *in fee* to the issue of *J. L.* then the other remainder to *E. B.* must be contingent likewise (because no remainder can vest after a contingent fee is first

first limited) and then it was destroyed by the recovery of *J. L.* the tenant for life.

Vide supra,
p. 161 & 277.

But the court, without determining whether *J. L.* took an estate only for life or in tail, were clearly of opinion, that take which he would, as he certainly took a freehold sufficient to support a contingent remainder, the limitation to *E. B.* could not enure as an executory devise, because that is not admitted where there is a preceding freehold capable of supporting a contingent remainder; and then as a remainder, if *J. L.* took an estate-tail, it was clear his recovery barred it; if he took only for life, then they were clear that the subsequent limitation to the heirs-male or female, &c. of *J. L.* was a good contingent remainder in fee-simple, and of consequence the limitation to *E. B.* must also be contingent and not vested, for a remainder cannot vest after a remainder in fee; therefore they adjudged that the remainder to *E. B.* was barred or destroyed.

Vide infra.

Here we see it was held that the limitation to the heirs-male or female, &c. of *J. L.* considering it as a remainder, must be a remainder in fee, not reduced into an estate-tail in such *heirs-male or female* by the subsequent words, and *if J. L. die, leaving no lawful issue*. And indeed there are particular expressions

Supra, p. 276.

Vide 1 P. W.
76.

pressions in the will which appear sufficient to induce such a construction. But in *Beck's* case above cited, the limitation to the first son of *J.* that should have *heirs-male*, &c. and to his heirs *in perpetuum*, though it is expressed an estate in fee, yet was considered (it seems) as controlled and abridged into an estate-tail by the subsequent words, and *in default of such issue* of his body, according to the observation of *Powell* Justice, who (in the case of *Idle v. Cook*) said, that though the limitation to the first son of *J.* who should have *heirs-male*, &c. was only a description of the person, yet the words *such issue* might likewise well enough refer to the words *heirs-males*, which might help the construction.

Doe v. Rea-
son. 3 Will.
244.

In another case indeed, cited in that of *Doe v. Holmes*, where a testator devised lands to *A.* during the term of her natural life, without impeachment of waste, and immediately after her decease to such issue of her body as should then be living, and to the heirs of such issue, that is to say, if one child, the whole to that child and *its heirs*, if two or more children then to them equally among them share and share alike, as tenants in common, and in case *A.* should die without issue of her body begotten then living, or in case all such issue should die without issue, so that all *A.'s* descendants should be dead without issue, then he devised the lands over to *T.* and *J.* their heirs

heirs and assigns for ever. After the testator's decease, *A.* and her husband suffered a recovery, and she died without ever having had any issue. The same question arose here as in the above cited case of *Doe v. Holmes*; the court held, as in that case, that the limitation to *T.* and *J.* was not an executory devise, for *A.* took an estate for life, which was capable of supporting a contingent remainder; and that the limitation to *A.*'s issue was only a remainder in tail (as in *Beck's* case above cited) for that the subsequent words *and if all such issue shall die without issue*, restrained the preceding limitation to the heirs of such issue, and reduced it to an estate-tail; the consequence of which was, that the subsequent limitation of *T.* and *J.* was a vested instead of a contingent remainder, and so not barred by the recovery of *A.*

Supra, p. 276.

**An executory Devise defined, and its
several kinds distinguished.**

Eq. Abr.
136

AN executory devise is defined to be a devise of a future interest in lands, not to take effect at the testator's death, but limited to arise and vest upon some future contingency.—This is the definition commonly given of an executory devise. It comprehends indeed every species of an executory devise; but at the same time it is not confined to executory devises only; it includes every kind of contingent interest in lands given by devise, (for every contingent interest must necessarily be future); now every contingent interest in lands limited by devise is not an executory devise, for some contingent interests by devise are contingent remainders; therefore such a definition must be considered as defective in point of precision and accuracy.

An executory devise is, strictly, such a limitation of a future estate or interest in lands or chattels (though in the case of chattels personal, it is more properly an executory *bequest*) as the law admits, in the case of a will, tho' contrary to the rules of limitation in conveyances

ances at common law. It is only an indulgence allowed to a man's last will and testament, where otherwise the words of the will would be void; for wherever a future interest is so limited by devise, as to fall within the rules above laid down for the limitation of contingent remainders; such an interest is not an executory devise, but a contingent remainder.

Carth. 310.
Reeve v.
Long.
4 Mod. 258.

As where a testator devised to his wife for life, and to her son after the death of his mother, if she should have a son, and if he should die within age, then to the right heirs of the deviser; the testator died without issue, his wife married again, then the heir of the deviser by fine conveyed the reversion to the husband and wife, who had afterwards a son born; it was adjudged, that the estate limited to that son should not enure by way of executory devise; because that is never allowed where a contingent estate is limited to depend on a freehold capable of supporting it; here the mother had a preceding freehold in herself, therefore it was adjudged a contingent remainder in her son; and the heir at law, having a reversion in fee in him by descent, it was held, that the remainder was destroyed by his conveying the reversion to the particular estate of the mother, before the son was born.

4 Mod. 284.
Purefoy v.
Rogers.
2Saund. 380.
Supra, p. 242.

And vide
2 Vezey, 616.

So

Walter v.
Drew. Com.
Rep. 372. &
infra.

So where a testator, in case his eldest son died without issue of his body, gave the lands to his youngest son and his heirs; it was held that the eldest son took an estate-tail by implication, and the devise to the younger son was a remainder; for that words should not be construed to give an estate by way of executory devise, but where the devisee cannot take any other way.

Wealthy v.
Bosville.
Rep. K. B.
Temp.
Hardw. 258.

And again, where a testator having charged certain legacies upon his lands, devised, that in case his son *T.* should happen to die before he married, or being married should have no children lawfully begotten, then his lands should remain and descend equally to his daughters and their heirs, paying, &c. except such jointures as his son should happen to make upon his wife not exceeding, &c. and in case both his daughters should die without being married, or being married should have no children of their respective marriages, then he willed that all his estate should descend to his nephew *J. M.* and at the end of the will he gave and devised to his son *T.* all his estate real and personal not already disposed of by his will. After the testator's death, his son *T.* entered and suffered a recovery to the use of himself and his heirs, and died without issue; upon which his sisters entered and suffered a recovery,

ry, and died without issue, upon which the heir of *J. M.* entered.

The question was, whether the devise to *J. M.* was a remainder depending on a particular preceding estate in the son and daughters, or whether it was an executory devise? And it was contended that if the son took any estate by the will, it must be an estate-tail; but that this could not be for want of express words, and that here was no necessary implication. But Lord *Hardwicke* was of opinion, that there were two rules which went a great way in determining the case; *first*, that it is immaterial which words come first or last, for the construction must be made upon the whole will; *secondly*, that no limitation shall be construed to be an executory devise, if it may be a remainder. That here in the subsequent part of the will was an express devise of all the residue, so that take the two clauses together, here seemed to be an express devise to the son, and it was given by the word *estate*, which was sufficient to carry the fee; so that it amounted to a devise to the son and his heirs, and if he died without issue, remainder, &c. and that was nothing but an estate-tail; but if that were not so clear, yet as to the daughters, he thought no objection could be raised; for there was a devise to them, and if they died without children,

And vide
supra, p. 295.
297.

dren, &c. so that their recoveries at least were sufficient to bar the nephew's remainder, and judgment was given accordingly.

But where a future interest without a preceding estate, or a contingent interest unsupported by any preceding freehold, or any estate after a preceding vested fee-simple, is limited by devise; such a limitation, as it cannot be good as a remainder, shall take effect as an executory devise, provided it falls within the limits which the law prescribes, for the limitation of such executory estates.—As if one devise to the heir of *J. S.* after the death of *J. S.* it is good as an executory devise.—

So where *A.* devised lands to *B.* in fee, to commence and take effect six months after the testator's death, it was a good executory devise.—So where testator devised to trustees for 500 years in trust to pay an annuity to *T.* his eldest son for life, remainder to the eldest son of *T.* (who had no son at the testator's death), it was held good by way of executory devise. So where a testator devised to *B.* his son and his heirs for ever, and if he died without issue living *A.* then to *A.* to have those lands to him and his heirs for ever; it was adjudged, that *B.* took a vested fee-simple, and that the limitation over to *A.* was good as an executory devise to take effect on *B.*'s dying without

Per Cur.
1 Salk. 226.

11 Lut. 798.
Clark v.
Smith.

2 P. W. 28.
Gore v. Gore.
Vide infra.

Pells v.
Brown.
Cro. Jac. 590.
1 Eq. Abr.
187. c. 4.

without issue in the life-time of *A.* In the first two of these cases, we observe there was no preceding estate; and in the third case no preceding freehold; and in the last case a fee was limited after a preceding vested fee.

Executory devises are distinguished into three kinds. The first sort is where the devisor departs with his whole fee-simple; but upon some contingency qualifies that disposition, and limits an estate on that contingency, of this the above cited case of *Pells v. Brown* is an instance.—So where a testator devised lands to his wife for life, remainder to *C.* his second son in fee, provided if *D.* his third son should within three months after the wife's death pay 500 *l.* to *C.* his executors, &c. then he devised the lands to *D.* and his heirs; this was an executory devise to *D.*

1 Salk. 229.

10 Mod. 420.
Marks v.
Marks.

The second sort of executory devises is where the devisor gives a future estate to arise either upon a contingency, or at a time certain; but does not depart with the fee at present, or limit any immediate freehold; as a devise to the heir of *J. S.* when he shall have one.—So where one devised lands to *J. S.* for five years from *Michaelmas* then next ensuing, remainder to *B.* in fee, and died before *Michaelmas*; it was adjudged good as an executory devise to *B.*—

1 Salk. 229.

Cro. Eliz.
878. Pay's
case.

Palm. 132.
1 Eq. Abr.
188. and
vide Thrust-
out v. Denny,
infra.

B.—So where one devised lands to his wife till his son should come to his age of twenty-one years, and then that his son should have the land to him and his heirs; and if he should die without issue before his said age, then to his daughter; this was a good executory devise to his daughter.

Dyer 74.
pl. 18.
1 Roll. Abr.
610. pl. 4.

Brook Devise,
pl. 13.
Cro. Car. 346.

The third sort is, where a term for years, or any personal estate, is devised to one for life, with remainder over. Such a limitation was void at common law, and the whole property vested in the person to whom it was limited for life. There was a distinction, indeed, taken between a devise (or rather bequest) of the *use* of a personal thing, and of the *thing itself*; thus where a devise was, that *A.* should *use* such a thing during his life, and afterwards that *B.* should have it, the devise over was agreed to be good; but if the first devise had been of the thing itself to one for life, and after to another, then the devise over had been void.

8 Rep. 95.
Math. Man-
ning's case.

10 Rep. 46.
Lampet's
case.

But the law is now settled, that such limitations over in a *will*, or by way of *trust*, are good. As where a term of years was devised to *B.* after the death of *C.* and that *C.* should have it during his life, it was adjudged that this was a good executory devise to *B.* of as much of the term as should remain unexpired at the death of *C.*—So where a lessee for 500 years devised his term to his father for life, remainder to his sister and
the

the heirs of her body, it was resolved that this executory devise over to his sister was good.

—So where *A.* devised his household goods to his wife for life, and after her death to his son, it was decreed a good devise over to his son.—

So a devise of 500 *l.* to the testator's daughter, and if she should die under thirty years of age, and unmarried, then to be divided between three; she died before the time, and it was resolved that the money should be divided accordingly.

1 P. W. 1.
Hyde v. Per-
rot.

2 Freem. 137.

Of the Effect of executory Devises, and their Limits.

HAVING shewn the distinction between the limitation of a contingent remainder, and of an executory devise, and given some instances of the several sorts of executory devises; I shall proceed to treat more particularly of the essential difference between the natures of those two estates; and to consider the bounds or restrictions, within which the law confines the limitations of such devises.

A contingent remainder (we have seen) may be limited in conveyances at common law; it relates only to lands, tenements, and heredita-

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ments real or mixed; it requires a freehold to precede and support it, and must vest at furthest at the instant the preceding estate determines.

An executory devise is admitted only in last wills and testaments; it respects *personal* estates as well as *real*; it requires no preceding estate to support it, and if there be any preceding estate, it is not necessary that the executory devise should vest when such preceding estate determines. But these are distinctions in the modes of their creation, rather than in the natures of the estates when created.

The great and essential difference between the nature of a contingent remainder, and that of an executory devise, (and that indeed which renders it material to distinguish the one from the other in their creation), consists in this: That the first may be barred and destroyed, or prevented from taking effect, by several different means, as I have already shewn: whereas, it is a rule, that an executory devise cannot be prevented or destroyed, by any alteration whatsoever in the estate, *out* of which, or *after* which it is limited.

Cro. Jac. 590.
Pells v.
Brown.

Thus where a man devised lands to his son T. and his heirs, and if T. should die without issue,

issue, *living W.* his brother, then *W.* should have those lands to him and his heirs; it was adjudged that *T.* took a fee, and that the limitation to *W.* was a good executory devise to take effect on the contingency of *T.*'s dying in the life-time of *W.* without issue; and that the recovery of *T.* did not bar this executory interest to *W.* But it is said in that case, if the person to whom the executory devise is limited, come in as vouchee, in a common recovery, that his possibility is thereby given up, and his heir barred.

But here we are to attend to the distinction, between the first limitation being *in fee*, and its being only in *tail*; in the first case we have seen the limitation over upon a dying without issue living *A.* was good as an executory devise; for the whole fee being first limited to a person *in esse*, there was no considering the subsequent limitation as a remainder. But if the first limitation had been in tail only, then the subsequent devise might have been considered as a contingent remainder depending on that estate-tail; and as limited to take effect, only in case that estate-tail determined in the life of *A.*; that is, in case the first devisee in tail died without issue in *A.*'s life-time.

And vide infra the distinction between Brownsword v. Edwards, and Collinson v. Wright.

Spalding v.
Spalding.
Cro. Car. 185.

Thus, where a testator having three sons *J.* *T.* and *W.* devised lands to *J.* and the heirs of his body in fee, after the death of *A.* the testator's wife, and if *J.* died living *A.* that *W.* should be his heir; and he devised other lands to his other sons and the heirs of their bodies respectively, and if all his sons should die without heirs of their bodies, then over, &c. the court conceived that upon the whole contents of the will, the construction ought to be, if *J.* died *without issue, living A.* then *W.* should have it; and that it should not abridge the former express limitation, nor should *W.* have the lands whilst *J.* had heirs of his body. So that here we observe, that the devise over to *W.* which was limited upon an event collateral to and independent of the determination of the preceding estate-tail, was not considered as enuring in defeasance or abridgment of it; but as serving to introduce, upon that event, a proper remainder expectant upon, and to await the regular determination of the preceding estate-tail.

By the rule above-mentioned it seems, that where there is an interest devised to one for life, &c. out of a term, and then an executory devise over of the term to another; any subsequent union of the freehold and inheritance with the interest so given to the first devisee, or a feoffment or other act of forfeiture by such first devisee,

devisee, will not extinguish or destroy the executory devise over.

As where *W.* possessed of a house for a term of years, devised the profits thereof to *J.* during the time she should continue sole, and then devised the term to *R.* and died. *J.* entered by assent of the executor, and afterwards purchased the fee. It was resolved, that although the whole term was in *J. quousque, &c.* so that by the purchase of the fee-simple *her* interest became extinct, yet the same did not defeat the executory devise to *R.* but that after the marriage of *J.* and not before, he might enter. And so in another case, it was agreed by the whole court, that if lands be devised for twenty-one years to *A.* and if he die within the years, that *B.* shall have the residue of the years; no act of *A.* can prejudice the remainder in *B.*

Hammington
v Rudyard,
cited in Lam-
pet's case.
10 Rep 52.

Vide Lee v.
Lee.
Moor 269.

And where a testator possessed of a term in lands, devised the profits thereof to his wife for eighteen years, and then that his son *E.* should have the lands for his life, and after his death that his eldest issue-male should have the profits, &c. after the eighteen years expired *E.* entered, had issue a son *R.* and then made a feoffment of the lands; whereupon the reversioner in fee entered for the forfeiture; and upon the question, whether the feoffment and entry for the

Cotton v.
Heath.
Pollex. 26.

the forfeiture had destroyed the executory devise to *R.*? It was decreed that they did not.

But, however, in regard to lands of inheritance, we are to observe, that where there is an estate-tail first limited, and then a conditional limitation is made upon that estate, a recovery suffered by tenant in tail before the condition happens, will bar the estate depending on that conditional limitation.

Page v. Hayward.

2 Salk. 570.

Pigg. Com.

Rec. 176.

Thus in the case of *Page v. Hayward*, where the testator devised to *A.* and the heirs-male of her body, upon condition and provided she intermarried and had issue-male by one surnamed *Searl*, and in default of both conditions, he devised to *E.* in the same manner, &c. *A.* married one whose surname was *Cliff*, and with him levied a fine and suffered a recovery of the lands, in which she and her husband (with another party not material to the present point) were vouched. 1st, It was adjudged by the whole court, that the estate devised to *A.* was a good estate in special tail, that is, to her and the heirs-male of her body begotten by a *Searl*. 2^{dly}, That the words *upon condition*, &c. though express words of condition should be taken to be a limitation; and so the sense was, that if she had no issue by a *Searl*, upon her death

death without such issue, the estate should remain over. *3dly*, That her estate did not cease by marrying one that was not a *Searl*, because she might survive her husband and afterwards marry a *Searl*. *4thly*, (and which is the point material in this place) that if the estate had been to *A.* and the heirs of her body by a *Searl* begotten, PROVIDED and upon CONDITION, if she marry any but a *Searl*, that then it shall remain and be to *J. S.* and his heirs; a common recovery, suffered before marriage, would bar the estate-tail and remainders; and her subsequent marriage with another would not have avoided the recovery.

So where lands were devised to several persons successively in tail, and a clause was inserted by the testator to the effect following, *viz.* "Provided always, and this devise is expressly "upon this condition, that whenever it shall "happen that the said estates shall descend or "come to any of the persons herein before "named, that he or they do or shall then "change their surname, and take upon them "and their heirs the surname of *W.* only, and "not otherwise." But there was no devise over upon breach of the proviso.

Gulliver v.
Shuckburgh
Ashby.
4 Burr. 1929.

A. the first tenant in tail, two years after his coming to the possession of the estates, suffered a common recovery, in which he was vouched;

vouched ; but he never took upon him the surname of *W.* The person next in remainder entered for breach of the proviso in *A.*'s not having changed his name. And it was contended in support of his title, that the proviso was a *conditional limitation* and not a *condition*, (for in the latter case none but the heir at law could have title) that the taking the surname of *W.* ought to have been complied with *immediately* ; that by the neglect of it, *A.*'s estate ceased by virtue of the conditional limitation, and before the recovery was suffered by him ; consequently, the title of entry of the next in remainder commenced before the recovery, and *A.* was not tenant in tail when he suffered it ; and that this circumstance distinguished it from the case of *Page v. Hayward* ; for there the condition was not broken before the recovery was suffered, but here it was.

However, the court held that this was not a conditional limitation, for it was not expressly so, the estate not being made to cease or go over upon it ; and it was not necessary to effectuate the testator's intention, that such a limitation should be implied : so far from it, that it would totally strip the issue of the tenant in tail, who neglected to change his name ; which could never be the testator's intention.

That

That it could not be a condition *precedent*, as it could not be complied with *immediately*, many previous acts being necessary for that purpose; and as a condition subsequent it was nugatory, because tenant in tail might immediately suffer a common recovery and bar the estate; and therefore Judge *Yates* thought it could only operate as a *recommendation* or *desire*. But however, the whole court agreed, that if it were considered as a condition, it was collateral and subsequent, and would be destroyed by the recovery.

In the above case one was cited, where upon a devise to a younger son and the heirs of his body, upon condition that neither he nor any of the heirs of his body should alien or discontinue the lands; it was held to be a condition, and a fine levied by him with proclamations was held such a breach of the condition, as to intitle the heir of the testator to enter. Upon which I shall only observe, that this case was in 38 *Eliz.* antecedent to the cases of *Sunday* and *Mary Portington* above cited, and before the distinction between a fine at common law, and one by the statute, in respect to the first being capable of being restrained by a condition annexed to an estate-tail and the latter not, appears to have been taken.

Vide Rudhall
v. Milward.
Savil 76.

Vide supra,
p. 183, 184.

Here

Vide 1 Mod.
111. and
Pigg. Com.
Rec. 136.

Here we are to observe, that a common recovery, by tenant in tail, bars all collateral condition subsequent and limitations; as if a gift be to one in tail determinable on his non-payment of 100*l.* remainder to *B.* in tail; first tenant in tail, before the day of payment, suffers a common recovery, and after fails in payment of the money; yet, because he was tenant in tail when he suffered the recovery, all is barred. So if tenant in tail be with a limitation so long as such a tree shall stand, a common recovery will bar that limitation.

Vide supra,
p 307.

But a common recovery has this operation only, when suffered by tenant *in tail*. For we have seen that a recovery by tenant *in fee* will not bar an executory estate, conditional limitation, or collateral condition, as was decided in the above cited case of *Pells v. Brown*.

This privilege of executory devises, which exempts them from being barred or destroyed, is the foundation of an invariable rule with respect to the contingency upon which an estate of this sort is permitted to take effect; which is, that such contingency must happen within a short space of time; such as a life in being or some few years after; otherwise it would be in a testator's power to limit an estate unalienable for generations to come; a power which the law very wisely denies to every man, as the exertion of it would tend to

to render property in great measure useless to the general purposes and calls of a commercial society. For every executory devise, so far as it goes, creates a perpetuity ; that is, an estate unalienable till the contingency be determined one way or another.

Upon this principle, although a devise to *A. and his heirs*, and if he die without an heir, that *B.* shall have it, is not good ; because of the remoteness of such contingency, which may not happen for several generations ; yet a devise to *A. and his heirs*, and if *J. S.* die, *living A.*, that *B.* shall have it, is good ; for this is a contingency confined to the period of a life in being.

1 Eq. Abr.
186. pl. 1.

Vide 3 Chan.
Ca. 19.

So where a man devised land to *A. and his heirs*, provided that if he should die *within age*, that then the land should remain to *B. and his heirs* ; it was a good executory devise.

Palm. 136.

I must observe here, that in respect to estates of freehold, by the *time of vesting*, I mean the time of *vesting of the freehold* ; for although land should be limited for a term of 200 years or upwards, with remainder to an unborn son of a person then living, this executory devise to such unborn son would be good ; because the vesting of the freehold is

con-

confined to the period of a life then in being; for upon the birth of such son, the freehold will vest in him, or upon the death of such person without any son, it must vest somewhere else, (only subject in either case to the preceding term.)

2 P. W. 28.
Gore v. Gore.

As where *A.* devised his lands to trustees for 500 years upon trusts, and after the determination of that term to the first son &c. of *B.* (who had no son born at the testator's death) this executory devise to the unborn son of *B.* was held good; because it was clear the freehold must vest, either on the birth of such son, or on *B.*'s death without having had any son.

Prec. Chanc.
67. Fairfax
v. Heron.

If one devise all his lands after the death of his executors to *A.* and his heirs for ever, but if *A.* should die *leaving* no son, then to *B.* this is a good executory devise to *B.* because the contingency is confined to the period of a life in being.

In all the foregoing instances, we may observe, the contingency was confined to the compass of a life in being; and it is just the same thing if the executory devise be limited to take effect within the compass of several lives in being, for whatever may be the number of such lives, the whole period can amount

to

to no more than the life of the survivor of them. Vide 1 Salk. 229.

So likewise an executory limitation to vest within a short time after the period of a life in being, is good. As where lands were limited to *A.* for life, then to his wife for life, remainder to trustees and their heirs during the lives of *A.* and his wife, to preserve contingent remainders; remainder to the first and other sons of that marriage successively in tail-male, remainder to the right heirs of *A.*; with a proviso, that if the heirs of the wife should within twelve months after the death of the survivor of the husband and wife, pay 4000*l.* to the heirs or assigns of the husband, that then the fee should remain to the heirs of the wife: the House of Lords held this executory limitation to the heirs of the wife to be good.

Loyd v. Carew.
Chanc. Prec.
72, Show.
Parl. Caf.
137. supra,
P. 199.

So where a testator devised to his wife for life, remainder to *C.* his second son in fee, provided if *D.* his third son should within three months after his wife's death, pay 500*l.* to *C.* his executors, &c. then he devised the same lands to *D.* and his heirs, and it was adjudged a good executory devise to *D.*

10 Mod. 419.
Marks v.
Marks.
Strange 12

The

The limitations in the two last cited cases were confined to vest within a certain number of months, after the end of a life in being. But these are not the utmost limits allowed for executory devises, for the courts have gone so far as to admit of executory devises, limited, to vest within the compass of twenty-one years, after the period of a life in being.

2 Mod. 289.
1 Eq. Abr.
188. c. 1.
Taylor v.
Biddal.
Freem. 243.

This was admitted in the case of *Taylor v. Biddal*, where a man having only one sister and heir, who had issue *A.* and afterwards married *B.*, by whom she had issue *C.* and *D.*, devised lands to his sister until *C.* should attain twenty-one, and after *C.* should have attained that age, to *C.* and his heirs; and if *C.* should die before twenty-one, then to the heirs of the body of *B.* and their heirs, as they should attain their respective ages of twenty-one. Testator died; *C.* died before twenty-one, living *B.*, afterwards *B.* died; *D.* (either as heir of *C.* in whom it seems the fee was vested*) or as heir of the body of *B.* being of age after the death of *B.* took the estate by way of executory devise. Here we see the heir of the body of *B.* could not take till after the death of *B.* for *nemo est hæres viventis.* and since that heir of the body of *B.* who should attain twenty-one, might not have been born before his father's death, and the estate could

* Vid. 3 Rep.
19 Boraston's
case. Palm.
132. 1 Bur-
row 233, and
infra.
Goodtitle v.
Whitby.

could not vest in him till the age of twenty-one, it is evident the estate might possibly not have vested under that limitation till twenty-one years after the period of a life then in being.

Again, where the testator devised lands to his grandson *W.* and his heirs, and if *W.* should die under age, then to his grandson *T.* and if *T.* should die under age, then to such other son of the body of his daughter *M. S.* by his son-in-law *T. S.* as should happen to attain his age of twenty-one years, remainder over. Testator died leaving two grandsons *W.* and *T.* who both died under age, afterwards another son *A.* of the body of *M. S.* by *T. S.* was born, and it was decreed a good executory devise to this after-born son *A.* if he should attain the age of twenty-one years. This case was decided, it seems, upon the authority of the decision in the above cited case of *Taylor v. Biddal*; it is a very leading case, involving other points than what arise out of the above state of it: for which I shall have occasion to state it more at large in a subsequent part of this essay, where the ground of the decision will appear.

Caf. Temp.
Tal. 228.
Stephens v.
Stephens.

Vide same
case infra.

In the preceding case, the limitation was not confined to vest in the life-time of *M. S.*
or

or *T. S.* for they might both die leaving a son quite an infant; but it was confined to vest at the infant's age of twenty-one; which must necessarily happen within twenty-one years after the death of its mother *M. S.* who was then in being.

Madox v.
Staines.
2 P. W. 421.

It is the same in regard to personal estate. For where the testator bequeathed the residue of his personal estate to his niece *A.* for life, and after her death the interest to be applied for the maintenance of such children as she should have, until the sons attained twenty-one, and the daughters eighteen years of age, and at such their ages to be paid their portions, and *for want of such issue*, then to the children of *S.* The niece died without issue, and it was contended that the bequest over to the children of *S.* was too remote; for if the words *for want of such issue* should signify for want of such children of *A.* as should attain the said ages, yet it would exceed the rule which had confined these sort of bequests (especially of mere personal estates) to lives in being. But Lord Chancellor *King* held it to be a good executory devise, and cited the case of *Massenburgh v. Ash*, where the like executory devise of a term for years was held good.

Massenburgh
v. Ash.
1 Vern. 234.
257, 304.
and infra.
And vide in-
fra Green v.
Ekins.

So where money in the orphan's fund and bank stock was limited by the testator in trust for

for such of his brother's children then unborn as should attain their ages of twenty-one; it was adjudged a good executory devise.

Caf. Temp.
Talb. 245.
Sabbarton v.
Sabbarton.

More instances of the established limits of executory devises, will be given in the sequel of this essay, in the case of the Duke of *Norfolk* and other cases relating to the limitations of terms and personal estates in tail, &c. only I shall observe in this place, that the law appears to be now settled, that an executory devise either of a real or personal estate, which must, in the nature of the limitation, vest within twenty-one years after the period of a life in being, is good; and this appears to be the longest period yet allowed for the vesting of such estates.

And here we may also remark, that the ground upon which the proviso in the case of *Lloyd v. Carew*, above cited, was admitted to take effect, affords us an inference, that future and shifting uses and other springing and executory interests, which are not remainders, are to be considered as subject to the same limits and restrictions as executory devises.

Vide supra,
p. 199. 317.
Lloyd v. Carew.

**Of executory Estates limited upon a failure
of Heirs or Issue.**

WHEREVER an executory devise is limited to take effect, after a *dying without heirs* or *without issue*, subject to no other restriction, the limitation is void; for the policy of our law will not suffer property to be tied up, and rendered unalienable in expectation of such remote contingencies.

3 Leon 111.

3 Atk. 617.
Tilbury v.
Barbut.

As where lands are devised to *A.* and his *heirs*, and if *A.* die *without heir* then to *B.*, this limitation to *B.* is absolutely void.—So where *A.* devised to *J. B.* and his *heirs* for ever, and if *J. B.* should die without any heir, then he devised the estate to *C.*; this limitation to *C.* was held void, because too remote.

Moor v.
Parker. Ld.
Raym. 37.
4 Mod. 316.
Skinner 558.

Again, where *A.* having upon the marriage of his son *B.* settled lands upon *B.* for life, remainder to the sons of that marriage successively in tail-male, reversion to *A.* in fee. *A.* afterwards reciting the settlement, devised to the sons of *B.* &c. according to the settlement, and if *B.* should die *without issue*, he charged the land with 4000 *l.* and gave *B.* a power of making a jointure upon any second wife,

wife, and then devised to the issues of *B.* by any other wife in tail-male, and in case of failure of *issue-male* of *B.* he devised the lands to his own grand children by his daughter *P.* in fee. After *A.*'s death, *B.* suffered a common recovery, and died without any issue-male. The question was, whether those claiming under the recovery, or the grandchildren of the testator, had the better title.

Now it is obvious this question depended on two points; first, whether *B.* took an estate-tail by the will? Secondly, if he did not, then whether the limitation over to the grandchildren after failure of issue of *B.* was good? As to the first point, the court agreed that it was impossible to make it an estate-tail in *B.* for nothing was given him by the devise; and that here being two several distinct conveyances, the settlement and the will, the devise to the issue, &c. in the will could not be tacked to the estate for life given to *B.* by the settlement, and therefore he had only the estate given him by the settlement. And though it was contended that he took an estate tail by implication by the words *in case of failure of issue-male* of *B.* yet this was denied, as no particular estate was given him by the will as a ground for implication to work upon; and so he took nothing by the will. As to the second point, that again must have depended on the

Vide *supra*,
p. 55.

Of this vide
infra the
Observations
on the Case of
Goodman v.
Goodright.

validity of the limitation to the issue-male of *B.* by any second wife; for if that were good, then the subsequent limitation to the grandchildren might also be good, as being to take effect either upon the death of *B.* if he died without having any issue-male by a second wife, or if he should have any, then as a remainder depending upon the estate-tail given to such issue. Now this limitation to the issue-male by any second wife, we are to observe, might be considered as a devise of the testator's reversion expectant on the failure of issue-male of *B.* by his first wife; for such issue-male took estates in tail-male under the settlement, and the reversion expectant thereon was limited to the testator by that settlement: and subsisting vested reversions or remainders, though they wait for a future possession, are present fixed interests, and capable of being disposed of and devised as such.

But here the devise of this reversion to the issue-male of *B.* by another wife, could not be a present disposition, because it was to persons not yet *in esse*. And *Holt* Ch. J. seemed to question whether this immediate devise was good to such issue not being *in esse*. He said, a devise to an infant *in ventre sa mere* is good as a future devise, but not if it be devised *in presenti*; and that here, if this was a void devise, the devise over to the grandchildren must

Vide infra.

must be void also; for it could not be good as a contingent remainder, because there was no particular estate to support it. And that as an executory devise it must be void, because it was to take effect upon the death of *B.* without issue-male. However, I don't find any decisive opinion delivered respecting the validity of this limitation to the issue-male of *B.* by a second wife. For in Lord *Raymond* and in *Skinner* the case *adjournatur*, and in *Mod.* it is said, judgment was given, that it was not an estate tail; so that no resolution at all appears upon the second point.

Vide supra.

So where *A.* having the reversion in fee of lands, (which upon the marriage of his son *B.* he had settled on himself for life, remainder to *B.* for 99 years, if he should so long live, remainder to trustees and their heirs during the life of *B.* remainder to the first and other sons of *B.* successively in tail-male, remainder to the heirs-male of the body of *B.* reversion to *A.* in fee,) devised all the lands mentioned or contained in that settlement, *on failure of issue of the body of B., and for want of heirs-male of his own body*, to his daughter *F.* and the heirs of her body; and it was adjudged by the House of Lords, that this will did not give an estate-tail by implication to *B.*, and therefore the devise to *F.* was executory and void, as being on too remote a contingency.

Cal. Temp.
Talbot 262
Lady Lane-
borough v.
Fox.

For

For we are to observe in this case, that the limitation to the daughter was future, to arise after the failure of issue of the body of *B.* and of heirs-male of the body of *A.* Now, there was no subsisting estate extending to the issue of the body of *B.* (generally) the settlement being confined to his first and other *sons* and their *issue male*; nor indeed was there any estate-tail in *A.* himself, to extend to the heirs-male of his own body, therefore the estate devised by *A.* could not be considered as the devise of a reversion depending or expectant on such preceding estates.

And though it should be granted, that as *A.* had but *one son*, and there was a limitation by the settlement to the first and other sons of such son in *tail-male*, the devise for want of heirs-male of his (*A.*'s own body, might have been construed as a devise of the reversion expectant on the failure of sons of his said son and heirs-male of their bodies; yet as there was no pre-existing estate extending to issue-female of the body of *B.*, it was impossible to consider the devise on failure of issue (generally) of the body of *B.* as the devise of a reversion expectant on failure of such issue; there being no preceding estate extending to that period; consequently, unless such a preceding estate was raised by implication, which

which we see was not admitted, the devise to *F.* was not the devise of a reversion, but was an executory limitation unsupported by any preceding estate; and being not to take effect till after a general failure of issue, was therefore too remote.

But if in this case *B.* had by the settlement been tenant in tail general, the remainder to *A.* in tail male, with reversion to him in fee, then I apprehend the above devise to his daughter *F.* would have been a good immediate devise of, or rather out of, his own reversion in fee.—For a grant of the reversion when it shall happen after the death of tenant for life, it seems, is construed a good grant of the present reversion, notwithstanding the words seem to be otherwise, and sound futurally. So in a case above cited, where *A.* made a feoffment to the use of himself for life, and after the death of *A.* and *M.* his wife, to the use of *B.* &c.; it appearing that *M.* by a former deed had an estate for life; *Hale* Ch. J. held that the mentioning the death of *M.* was only expressing when *B.* should be intitled to the possession.

Vide 1 Saund.
145, 6.
Wade v.
Beale.
2 Mod. Entr.
234 and
cases there
cited.
10 Rep. 107.
3 Cro. 323.
Vide supra,
p. 229.
Weale and
Lower.

And the court agreed in the case of *Badger* v. *Loyd*, that if a man seised in fee devise his lands to *A.* if *J. S.* a stranger die without issue, that this is an executory devise; because there

is
1 Salk. 232.
1 Ld. Raym.
523. in the
case of *Bad-*
ger v. *Loyd*.
And vide
3 Atk. 449.

is no particular estate to support it ; and therefore it is void as being too remote ; but that if a man seised of the reversion after an estate-tail, devise the lands to another *after failure of issue of tenant in tail*, it is an immediate devise of the reversion expectant on the estate-tail, and therefore good. — So in the preceding case of *Lanesborough v. Fox*, as there was no estate-tail in *B.* or in *A.* the devise of lands upon failure of *issue* of the one, and of *heirs-male* of the body of the other, was a devise of a future interest not dependent on any preceding estate ; whereas if *B.* had been tenant in tail, with remainder to *A.* in tail male, then would such a devise have been no more than the devise of a present interest, expectant on those estates-tail, capable of being barred, and therefore good.

We have seen that in the case of *Lanesborough v. Fox*, the words *on failure of issue of the body of B.* were not held sufficient to raise him an estate-tail in remainder by implication, he taking no express or particular estate at all by the will ; which resolution perfectly agreed with the doctrine in the above cited case of *Moor v. Parker*. And it does not appear by the report, that any idea at all was entertained in the case of *Lanesborough v. Fox*, that these words *on failure of issue of the body of B.* could, by implication, raise estates-tail in remainder to
the

the issue of the body of *B.* as purchasers, so as to support the subsequent limitation to *F.*; and indeed such a construction was denied by the opinion of the Judges when they said, "That *F.* took no estate whatsoever, but that "the devise to her was absolutely void in its "creation, as being on too remote a contingency;" for had such an implication been admitted, it might have given effect to the devise to *F.* However, in a later case in Chancery, we find that an implication of a nature not very different from this, was contended for, and endeavoured to be supported; and was even expressly admitted by the Judges of the King's-Bench, in their certificate upon a case stated for their opinion; though the Lord Chancellor did not seem to approve of or adopt it, but appeared to found his decision on another ground.

The case I am now alluding to, was that of *Jones v. Morgan*, where *A.* upon his intermarriage with *B.* had settled certain land, &c. in the counties of *M.* and *G.* upon himself for life, remainder to trustees to support contingent remainders, remainder (subject to a jointure rent-charge to his wife) to his first and other sons by the said *B.* successively in tail-male, reversion to himself in fee, (subject to the several trust terms usually limited in settlements for securing pin-money and raising portions

In Chancery,
1773.
Jones v. Morgan.

tions for younger children and daughters) Afterwards *A.* having two sons of that marriage *W.* and *E.* made his will, and after giving certain specific things to his said wife and two sons, and making a disposition of certain other lands in the said counties which he had purchased since his marriage, proceeds in the words following, *viz.* “ And forasmuch as it
 “ is my will, intent and meaning, that in case
 “ my said two sons now living, or *any other*
 “ *son or sons of mine lawfully begotten* hereafter
 “ to be born, should die without issue-male of
 “ their bodies, or of the body of some or one
 “ of them lawfully to be begotten, after their
 “ respective decease without issue-male as
 “ aforesaid, that then all and singular my messuages, lands, &c. in the several counties of
 “ *M.* and *G.* not herein before devised, shall
 “ be devised and settled to and for the several
 “ uses, &c. herein after mentioned, &c. : It is
 “ therefore my will, intent and meaning, that
 “ in case my said sons *W.* and *E.* or *any other*
 “ *son or sons of mine* hereafter to be born as
 “ *aforesaid*, shall happen to die respectively
 “ without any issue male of their bodies, or of
 “ the body of some or one of them as aforesaid,
 “ and in such case if it shall so happen, then I
 “ give and devise the remainder of all and
 “ singular my messuages, lands, &c. in the
 “ several counties of *M.* and *G.* and not herein
 “ and

“ and hereby before devised, and the reversion
 “ and reversions, remainder and remainders of
 “ the same premisses to my (said) brother *T.* for
 “ and during the term of his natural life, with-
 “ out impeachment of waste, but subject ne-
 “ vertheless to the several provisoes and pay-
 “ ments mentioned and contained in my said
 “ marriage-settlement, &c.

And then the testator limits the same lands
 to trustees during the life of *T.* to preserve
 contingent remainders, remainder to *T. M.*
 son of *T.* during his life, remainder to trust-
 ees to support contingent remainders, remain-
 der to the first and other sons of *T. M.*
 with divers remainders over; and he appointed
 his wife one of five guardians of such of his
 (the testator's) children as should be under age
 at the time of his death, and also one of the
 executors of his will.

The testator died, leaving his said wife *B.*
 and his said two sons and two daughters by
 her. And one of the questions upon this will
 was, Whether the said residuary devise over to
T. and his son, &c. was not void, as being a
 future limitation not to take effect till after the
 failure of issue of persons who took no preced-
 ing estate, namely, of all other sons of *A.* by
 any future wife; for this limitation to *T.* &c.
 was not expressed to take effect upon failure
 of

of issue-male of the testator's sons by his then wife, in which case it would have been good, as an immediate devise of the reversion expectant on the estates in tail-male limited to such sons by the settlement; but the words were general and comprehensive, extending, in point of expression, as well to the future sons of the testator by any after-taken wife as by his then wife; and if so, this limitation could not be a devise of the reversion immediately expectant on the estates subsisting or created by the settlement, but was a future devise without any preceding estate to support it; and then as it could not take effect as a remainder, it could be considered only as an executory devise; in which light it must be void, for it was too remote, as being limited to vest on a general failure of issue.

In support of the devise, it was contended, that the testator had not a future marriage in view, or any children not provided for by his settlement; that this appeared from his giving some specific legacies to his wife, naming her one of his executors and one of the guardians of his children. Therefore the words *or any other son or sons, &c.* were to be understood as confined to sons by his then wife; and under that construction, the limitation in question would be good as an immediate devise

vise of the reversion, subject to the estates created by the settlement. Or that if those words did extend to children by a *future* marriage, still the limitation in question might be supported, by *raising implied estates-tail* to such children.

Upon a case stated for the Judges of the King's-Bench upon this devise, they certified, "That they were of opinion, that the event
"of a second marriage was not in the testator's
"contemplation; but supposing that from the
"generality of the description the words any
"after-born *son*, should be extended to the
"son of any future marriage; they were of
"opinion, that from the manifest intent of the
"testator expressly declared in his will, such
"son must take an estate-tail; consequently
"they were of opinion that either way a remainder after estates tail was devised to *T.*
"who by virtue of the said limitation, upon
"failure of the sons of the testator without
"issue-male, was intitled to all the lands in
"the counties of *M.* and *G.* devised by the
"residuary clause in the said will for life, with
"remainder according to the limitations in the
"said will."

The Lord Chancellor decreed accordingly.
He concurred entirely with the opinion certified

tified by the Judges, in regard to the event of a future marriage not being in the testator's contemplation, and consequently that the words *or any other son or sons* were to be restrained to sons of the first marriage. But as to the raising an estate-tail to any sons of a future marriage by *implication*, he expressed himself inclined to the opinion, that he was bound by the decision of the House of Lords in the case of *Lanesborough v. Fox*, as a direct authority against the admitting *such implication*.

Upon an appeal to the House of Lords from this decree, it was affirmed agreeable to the unanimous opinion of the Judges; founded (as appeared by what was expressed by the Chief Justice of C. P. in delivering their opinion) upon the very same ground to which the Lord Chancellor seemed to think himself confined, *viz.* upon the presumption that the event of a future marriage was not in the testator's contemplation; and that therefore the words *or if any other son or sons, &c.* must be understood of sons of the testator by his *then* wife.

Again, where tenant for life, remainder to his wife for life, remainder to his own right heirs, devised in manner following: "*Item,*
" My

" My lands at *W.* my wife is to enjoy for her
 " life, after her decease of right it goeth to
 " my daughter *E.* for ever, provided she hath
 " heirs; if my said daughter *E.* should die
 " before her mother, *or* without heirs, and my
 " said wife should marry again and have an
 " heir-male, I bequeath him all my right to
 " that estate; not thinking I can sufficiently
 " reward her love: if my said wife marrieth
 " again and fails of heir-male, after her de-
 " cease and my daughter's, she failing of heirs,
 " I bequeath 50 *l. per annum* of that estate to
 " my brother *J.* and his heirs for ever." The
 testator died, the wife married again, and had
 issue male, afterwards the daughter died with-
 out issue. Upon a question whether the heir
 at law of the deviser, or the heir male of the
 wife was entitled to the estate? The court held
 the former part of the will to be no devise,
 but only a declaration how the estates were
 settled; and therefore there being no particu-
 lar estate to support the limitation to the heirs-
 male of the wife, it could not enure as a con-
 tingent remainder; if it were an executory de-
 vise, it must either be to take effect on the
 daughter's dying before her mother, *and* with-
 out heirs (by taking the word *or* for *and*, and
 so construing it copulatively) in which case the
 condition had not happened, because the
 daughter survived the mother; or else it was
 to take effect in either of the events of the
 daughter's

Wright v.
Hammond.

1 Stra. 427.

2 Eq. Abr.

338. pl. 11.

Vin. vol. 8.

p. 110. pl.

32.

daughter's dying before her mother, *or* her dying without heirs: now one of these events had failed, because the daughter survived the mother, and the limitation upon the other, *viz.* of the daughter's dying without heirs, was too remote.

2 Burr. 873.
Goodman v.
Goodright.

So where *A.* upon the marriage of her niece *B.* covenanted to settle lands (at or after such time as *C.* the husband of her niece should settle his estate to the same uses) to the use of herself for life, remainder to trustees for 200 years, remainder to *C.* for life, remainder to trustees to preserve contingent uses, remainder to *B.* for life, remainder to the first and other sons of *C.* upon the body of *B.* in tail successively, remainder to the first and other daughters of *C.* upon the body of *B.* in tail successively, remainder to the right heirs of *A.* Afterwards, and before any settlement was made, *A.* by her will reciting the articles, and that she had agreed to settle the lands in manner aforesaid, devised the said lands, &c. and the *absolute inheritance* thereof, to the use and behoof of *the heirs of the body* of the said *B.* by any other husband to be begotten, and for *want* of *such issue*, to the use of her nephew *L.* and the heirs of his body, with several remainders over: remainder to her own right heirs. *A.* died seised; *C.* and *B.* his wife entered and suffered a common recovery, in which they were vouched;

vouched; the uses of the recovery were to C. for life, remainder to B. for life, remainder to trustees to support contingent remainders, remainder to first and other sons of C. and B. successively in tail male, remainder to the daughters in like manner, remainder to the uses to be jointly appointed by C. and his wife, remainder to the right heirs of B. B. died without issue, afterwards C. died; and the question was betwixt the heir at law of B. and the daughter of L.

The points upon which this question depended were; 1st, Whether the will was to be taken as an execution of the articles? 2^{dly}, If not, whether the estate to the *heirs of the body of B.* by another husband should be tacked to the estate given her by the articles? 3^{dly}, Whether the devise to the *heirs of the body of B.* by any other husband was not absolutely void, being a devise in *verbis de presenti* to a person not in *esse*; and if so, whether L. did not take immediately, as much as if there had been no preceding devise; or at least, whether the preceding devise to the heirs of the body of B. by any other husband, ought not to be laid out of the case, having become void in event, since the event of her having issue by any other husband never happened?

Z

After

After this case had been very fully argued, the court resolved, that if the will should be taken as an execution of the articles, and as an actual devise of the particular estates, according to the limitations contained in the articles, then the subsequent limitation to the heirs of the body of *B.* by a second husband, would vest in her as an estate tail, (in remainder) and consequently the recovery suffered by her and her husband had barred the subsequent limitation to *L.* But that it was unnecessary to enter into the question, whether the articles and the will could be *tacked together*; because if a devise of the particular estates expressed in the articles, could not be implied by construction, and *supposing the devise to the heirs of the body of B. by a second husband to be void*, the limitation to *L.* and the heirs of his body could not be a contingent remainder (for want of a preceding estate). And it was too remote as an executory devise; being not to take place till after an indefinite failure of issue of the body of *B.*; and being too remote in its creation, the event could not vary the construction: so that the death of *B.* without issue, could make no difference in the case. Therefore either way, *L.* could have no title, unless it were considered as a *present immediate devise* to him. But the court held that neither the words nor the nature of the provision would admit of that construction: and that it could
not

not be imagined that *A.* intended to exclude the issue of her favourite niece *B.* in order to prefer *L.* and his issue.

I observe in the report of the above case, the court delivered no express decisive opinion, as to the validity of the limitation to *the heirs of the body of B.* by any other husband, taken as a future devise; but it must be inferred from the judgment, when compared with the words of Lord *Mansfield*, that the court were inclined to avoid admitting the validity of that limitation; for Lord *Mansfield* said: “ *And supposing* the devise to the “ issue of *B.* by any second husband to be “ void, the limitation to *L.* could not take “ place as a contingent remainder.” And indeed, supposing that limitation not to have been void, then I apprehend, the subsequent limitation to *L.* might well have taken place; even though the will was not considered as an execution of the articles; as it would then either have taken effect in possession after the death of *C.* and of *B.* without her leaving issue by a second husband; or would then, if *B.* had left any such issue, have vested in interest, as a remainder upon the estate tail, then become vested in such issue: *vide* the cases of *Gore v. Gore*, and *Brownsword v. Edwards*, hereafter cited, where a limitation after an executory de-

Vide infra
Gore v. Gore,
and *Brown-*
sword v. Ed-
wards.

vise in tail being so limited as to take effect, either in lieu of the preceding executory devise, if that failed, or else as a remainder to depend upon it, if that took effect, was good. So here, if the executory limitation to the *heirs of the body*, of *B.* had been held good, I don't see that there could have been any objection to the subsequent estate limited to *L.*; for it must have vested, either in possession or interest, at the time when the preceding limitation was limited to take effect: and if it vested only in interest, it thenceforth became liable to be barred by the tenant of the preceding estate-tail, and therefore could not be considered as extending a perpetuity, beyond what the first limitation itself would do.

However, though the validity of the limitation to the heirs of the body of *B.* by any other husband appears to have been questioned in this case, in the same manner as the limitation to the issue-male of *B.* by a second wife was, in the above cited case of *Moor v. Parker*, and some ground seems to be afforded us, to infer that the court were not inclined to admit of its validity; yet there is no direct or decisive resolution upon the point in this case, any more than in the other of *Moor v. Parker*. But the court in both cases seem to have avoided the point, and declined entering into the real merit of the distinction taken between
an

an executory limitation to a person not in *esse*, when made *per verba de presenti* (as the phrase is) and when made *per verba de futuro*. Of this distinction, however, I shall take occasion to treat in a subsequent page of this essay.

Vide infra.
Doe v. Carlton, and Harris v. Barnes.

The like rule holds in the limitation of a *term* or *personal* estate, viz. that a disposition thereof to take effect after failure of *heirs of the body*, or dying *without issue*, without other restriction, is too remote.

1 Roll. Abr. 610. p. 7.
Palmer 50.
Lewknor's case.

Thus, where there was a limitation of a term in trust for *R.* during his life, then in trust for his wife during her life, and after their deaths in trust for their children during their lives; and if *R.* and his wife should die within the term without *issue*, or having *issue*, if that issue die within the term, then to *W.* this limitation to *W.* was held void.—There is a long series of cases to this purpose reported by *Pollexfen*, from page 24 to 44, with which I think it unnecessary to trouble the reader in this place, in support of a doctrine so fully established by later authorities; though I shall have occasion to mention some of them in the sequel of these sheets, upon points of a different nature. I shall here content myself with citing only two or three plain leading cases on the present point.

Perse v. Reeve.
Pollex 29.

For

1 Roll. Abr.
611. pl. 1.
Leventhorp
v. Ashby.

For instance, where a man possessed of a term, devised it to one, and the heirs male of his body, and for default of such issue to another, and the heirs-male of his body, this was adjudged a void remainder; for if it should be suffered, a man might make perpetuities of a term.—But the law will no more admit of a perpetuity in one sort of estate, or species of property, than in another.

1 Ventr. 79.
1 Lev. 290.
Love v.
Windham.
And vide
Pollexf. 24.
& seq.

Again, where *A.* possessed of a term for 99 years, determinable upon three lives, devised the lease to his wife for life, and after her decease to *N.* his son *for life*, and if *N.* should die *without issue*, then to *B.*; it was held that the remainder to *B.* was void, for that the remainder of a term could not depend on a possibility so remote as the *dying without issue*.

1 Roll. Abr.
611. pl. 1.
Leventhorp
v. Ashby.
10 Rep. 87.
4 Inst. 87.

And upon these cases we are to observe, that a term or personal estate cannot, properly speaking, be intailed; for where a term or other personal estate is limited to one in tail, it is an absolute and complete disposition of the whole term to him and his executors; he may dispose of it as he pleases; if he does not dispose of it, it goes to his executors and not to his issue; and it does not revert for default of issue. Though a distinction indeed has been taken, between such a devise of a term *in gross*, and of a term *de novo* out of the inheritance;
upon

upon the opinion expressed by Lord Coke in *Leonard Lovie's* case, that a devise of a term *de novo* to one and the heirs of his body, shall endure no longer than he has heirs of his body. 10 Rep. 87.

Thus where *A.* seised in fee, demised to *B.* his executors and administrators for 99 years, in trust for *A.* and his wife for their lives, and the life of the survivor, and after the death of the survivor, in trust for the heirs of their two bodies, and in default of such issue, then in trust for the heirs of the body of *A.* the husband, and in default of such issue, in trust for the heirs of the survivor of husband and wife. They had issue a son, the husband died, and then the son died without issue, and the mother administered to the husband and son, and assigned the term. After the death of the husband and wife, it was contended by the heir at law of *A.* that all the trusts of this term expectant on the death of husband and wife, either became void by accident, or were originally so in their creation; for that the limitation to the heirs of the bodies of *A.* and his wife, ought to be considered as a contingent estate to the person who should answer that description; which failed in event because no issue of their bodies survived them both to answer it; for *nemo est hæres viventis*; and then both the subsequent limitations were void, being

Hayter v.
Rod.
1 P. W. 362.

ing limitations of the trust of a term after a general failure of issue; and so the trust for the husband and wife being determined by their death, and the rest being void, the term had no subsistence for the benefit of the personal representatives of any of the parties; but should be considered as attendant on the inheritance.

And in support of this, the above noticed distinction between a term, created *de novo*, and a term in gross was insisted upon, *viz.* that although where *A.* possessed of a subsisting term of 500 years, devises it to *B.* and the heirs-male of his body, the whole shall vest absolutely in *B.* and though he should die without leaving issue, it shall go to his executors, and not revert for the benefit of the executors of the testator: Yet that where one seised of land in fee, devises it to *B.* and the heirs-male of his body for 500 years, here this term though it goes to *B.*'s executors, and not to the heirs-male of his body, yet upon failure of such issue-male, the term shall cease for the benefit of the heir at law of the testator. But, in this case it was decreed, that the term should not be attendant on the inheritance; for that the party who raised the term, and had power to sever it from the inheritance, shewed his intention so to do, by limiting the trust to the survivor of him and his wife,

wife, and the heirs of such survivor; which, though it was a void limitation, manifested his intention to sever the term from the reversion.

However, we are to observe, that Lord Keeper *Finch* in the case of *Burgis v. Burgis* said, Vide 1 Mod. 115. he did deny Lord *Coke's* opinion in *Leonard Lovie's* case, which saith, that in case of a lease settled to one and the heirs-male of his body, when he dies the estate is determined; for *Finch* said it should go to his executors. So likewise Lord *Nottingham* in the Duke of *Norfolk's* case, said it was Lord *Coke's* error in *Leonard Lovie's* case to say, that if a term be devised to one and the heirs-male of his body, it shall go to him or his executors no longer than he shall have heirs-male of his body; for these words are not a limitation of the time, but an absolute disposition of the term; and indeed the decision in the Duke of *Norfolk's* case seems to contravene that opinion of Lord *Coke*. 3 Cases in Chanc. 30.

That the limitation of a personal estate to one in tail, vests the whole in him, is proved by many cases.

Thus, where one devised that all his money in the government-funds should be laid out in the purchase of lands, and settled on his eldest 1 P. W. 290.
See v. Scale.

eldest son *A.* and the *heirs-male* of his body, remainder to the second son *C.* and the *heirs-male* of his body; and bequeathed the rest of his personal estate to *A.* and the *heirs-male* of his body, remainder over in the same manner; Lord Chancellor held that the personal estate, (*viz.* the residue after what was to be laid out in purchase of lands), could not be intailed, but the whole vested in the eldest son.

Dod v. Dickinson. Vin.
vol. 8. p.
451. pl. 25.

So where long Exchequer annuities for 99 years were given by will to trustees for the residue of the term, *in trust* for *E.* for so many years of the said term as she should live, afterwards to the plaintiffs for so many years of the said term as they or the survivor of them should live, and after the decease of the survivor *in trust* for the *heirs of their bodies* lawfully begotten, for all the residue of the said term, and for default of such issue, in trust for the defendant: Lord Chancellor *King* held the remainder over to be void, and that the whole vested in the plaintiffs, to whom the limitation was for life, with remainder to the heirs of their bodies; and accordingly the annuities were decreed to be sold, and the money to be paid to the plaintiffs. In this case the devise was only in *trust*, and yet the rule was the same.

So

So where a testator by his will devised that 400*l.* should be put out on good security for his son *T.* that he might have the *interest* of it for *his life*, and for the *lawful heirs of his body*, and if it should so happen that he should die without heirs, it should go to his youngest son *J. B.* Lord *Hardwicke* decreed that the whole vested in the first taker, and the limitation over was too remote.

1 Vezey 133.
154.
Butterfield v.
Butterfield.

The same point has been since adjudged in a late great case, where *R. T.*, by will, gave the *profits and half-yearly dividends* of 4000*l.* capital bank stock to Sir *W. P.* during his life; together with the income and payments of six annuities payable at the Exchequer, to receive the *payments* during his life.—And gave his dwelling-house in *London* (being leasehold) and the use of all the furniture and household linen therein, to *M. C.* during her life: and gave to *L. A. P.* (daughter of Sir *W. P.*) his dwelling-house and estate at *O.* and the *use* of all the goods, furniture and linen there, together with all the cattle and cart horses, and the utensils in husbandry, as well as some other estates and leasehold houses, during the term of her natural life. And after the death of *M. C.* he gave to *L. A. P.* his dwelling-house in *London*, and the *use* of all the goods therein during her life.—And after the death of Sir *W. P.* he gave to *L. A. P.* the

Daw. v. Pitt
(since Earl of
Chatham) and
Western,
heard at the
Rolls. July
1766.

the *dividends* on the 4000 *l.* bank stock, and all the *payments* growing due on the said Exchequer-annuities *during her life*; and after her decease he gave, bequeathed, and devised all the afore-mentioned land, houses, bank stock, and Exchequer-annuities, to the *heirs-male of her body* lawfully begotten for ever; together with all the furniture in both his houses: and for *want of such issue*, he gave and bequeathed all the said respective estates, bank stock, and annuities unto *W. D.* for life, remainder to the heirs-male of his body, remainder over.

Upon the death of *R. T.*, *L. A. P.* entered on the estates devised to her, suffered a recovery, and sold the real estates: afterwards she devised and bequeathed all her real and personal estate to the said Sir *W. P.* (her father) his heirs, executors and administrators. Her father surviving her, by his will, after giving several legacies, gave and devised all his real estates, and all the residue of his personal estate (which residue included the leasehold estates, furniture, bank stock and annuities devised as above to *L. A. P.*) unto the defendant *W. P.* his heirs, executors, administrators and assigns. After the death of Sir *W. P.* the plaintiff *W. D.* claimed the leasehold estate, bank stock and Exchequer-annuities, by virtue of the remainder limited to him in the will of *R. T.* But the Master of the Rolls held

held the limitation over to *W. D.* to be void, and that the whole vested in *L. A. P.* and therefore dismissed the plaintiff's bill.

But upon a re-hearing before the Lords Commissioners of the Great Seal, they reversed the order of dismissal, and decreed, that the plaintiff should have the benefit of the said leasehold estates, bank stock, and Exchequer-annuities during his life. Afterwards, however, upon an appeal to the House of Lords, the Lords, reversed that decree, and thereby established the decision of the Rolls. June 1770.

Here we observe, that although only the *dividends* and *payments* of the stock and annuities and *use* of the furniture were devised for life to *L. A. P.* and not the stock annuities, or furniture themselves expressly; yet it was held to be the same thing: for as a devise of the *rents* and *profits* of land is tantamount to a devise of the land itself; so *pari ratione*, a devise of the dividends and payments of stock and annuities, and of the use of furniture, seems equivalent to a like limitation of the stock annuities or furniture themselves; for such dividends, payments or use, are the only immediate produce, or value of the stock, annuities or furniture. 1771.

But,

But, we are to remember, however, that although a devise over after a dying *without heirs*, is in general void ; yet this rule is not without exceptions ; for if the person to whom the limitation over is made, be collateral heir to the first devisee, in that case the first devisee takes only an estate-tail ; because the limitation over to the collateral heir plainly denotes that only lineal heirs could have been intended. As where *A.* devised lands to *B.* and his heirs, and for *want of heirs* of him, to *D.*, it was adjudged an estate-tail only in *B.* because *D.* was a near relation and heir to *B.* and therefore *B.* could not die without heirs so long as *D.* or any of his lineal heirs existed.

Vide Cro.
Jac. 415.
Webb v.
Herring.

3 Lev. 70.
Parker v.
Thacker.

Cas. Temp.
Talb. 1.
Tyte v. Wil-
lis.

So where *A.* devised lands to his wife for life, then to his son *H.* for life, remainder to his son *G.* and his heirs for ever, and if he should die *without heirs*, then to his two daughters ; this was determined to be an estate-tail in *G.* ; for it was impossible he should die without heirs whilst his sisters were living ; consequently the testator by *heirs*, could only mean *heirs of the body*.

1 P. W. 23.
Nottingham
v. Jennings.

The rule holds the same where the remainder is limited to the heirs of the testator himself, if such heirs must also be heirs to the first devisee. As where *A.* devised to his second

cond son and his heirs for ever; and for want of such heirs, then to the testator's right heirs; here, though the devise to the testator's heirs was a mere nullity, as such heirs must be in by descent, yet it was held sufficient to manifest the intent and aid the construction of an estate-tail.

But, wherever the remainder, after dying *without heirs*, is limited over to one who is not heir to the first devisee, such after limitation does not alter the preceding positive devise in fee; nor will the courts, it seems, in that case, go so far as to restrain the general import of the word *heirs* to that of the words *heirs of the body*.

Thus where there was a devise to one and his heirs, and if he die without heirs, then to a *charity*. Lord Chancellor said, the devise being to one and his heirs, and if he die without heirs, then over, such devise over was void, and the word heirs should not be construed to signify heirs of the body, where the devisee over is not inheritable.

Attorney General v. Gill.
2 P. W. 369.

So where the testator devised to his son *and his heirs*, and if he should die *without heirs*, remainder over to another who was half brother to the first devisee; upon a question made, Whether the first limitation was in fee or in tail? Lord *Hardwicke* said it was a plain case,

1 Vezey 89.
Tilburgh v. Barbut.
3 Atk. 617.

case, and one of those points which the court would not suffer to be argued, as having been determined before. This was a devise over to a stranger, as the law considers him, and who could not in any event inherit as heir to his brother.

Again, a devise may be to one and *his heirs*, with an executory devise over, limited to take place on an event which must happen within the compass of a life in being. As where a testator devised to *A.* and his heirs, and if he should die *before twenty-one, then to B.* and his heirs, this was a good executory devise to *B.*

Vin. 8. fol.
112. pl. 38.
Gurnel v.
Wood.

Vide Duke of
Norfolk's case
3 Chanc. Caf.
1. &c. and
infra, p. 353.

Upon the same principle, though an executory devise to vest on a dying *without issue generally* is not good, because too remote; yet where the dying without issue is restrained to the period of a life in being, an executory devise thereon limited will be good.

Child v.
Bailey.
Cro. Jac. 459.
1 Roll. Abr.
611. p. 5.
Palm. 48. 333.

It is true indeed, that in the case of *Child and Bailey*, where the testator possessed of a term devised it to his wife for life, and after to *W.* his eldest son and his assigns, and if he died without issue *then living*, to *T.* another son; it was held to be a void devise to *T.* And so again where testator devised a term to his son, and if

he

he died *unmarried* and with out issue, then to his daughter, and if his son be married, and had no issue *then living* to enjoy it, then after his son's wife's death, to his daughters; the court held that though it should be intended a dying without issue living at his death yet it would be void according to *Child* and *Baily's* case.

Gibbons v.
Summers.
3 Lev. 22.
1 Eq. Abr.
192.

But however, the authorities of these and other cases of the like nature, have been since over-ruled. The case of *Child* and *Baily* was cited and commented upon by Lord *Nottingham* in the Duke of *Norfolk's* case, where indeed he denied and decided directly against it; and a great many subsequent cases have been decided on the principles upon which Lord *Nottingham* proceeded in his decision of the Duke of *Norfolk's* case

The Duke of *Norfolk's* case was in effect this. *H. F.* having several sons created a term of 200 years, and declared it to be in trust for his second son, and the heirs male of his body, remainder to his other sons; provided that if his eldest son died without issue, or not leaving his wife enscint with a child, living the second son, or that after the death of the eldest son by failure of issue male of his body, the Earldom of *A.* should descend on the second son, then the trust should cease as to the second son and his heirs; and then the trust should

Duke of Nor-
folk's case.
3 Chan. Ca. 1.
Pollex. 223.

A a

be

Vide also the
case of Wood
v. Saunders.
Pollex. 35.

be for the third son and the heirs male of his body, with like limitation to the other sons; the eldest son died without issue, living the second son; and the Earldom of *A.* did descend to the said second son. Whether the executory limitation over to the third son upon that event was good, was the question. And Lord *Nottingham*, upon the ground of its being a limitation to take effect upon the dying without issue, within the compass of a life then in being, decreed it was a good limitation to the third son, contrary to the opinion of the three chief justices, who assisted him; this decree was afterwards reversed by Lord Keeper *North*, but that reversal was again reversed upon an appeal to the House of Lords, who established Lord *Nottingham's* decree.

Vide 1 Eq.
Abr. 192.
1 Vern. 234.

Here we are to observe, that an executory devise of a term, and the limitation of the trusts of a term are governed by the same rules.

1 Salk 225.
Lamb v. Archer.

So where the testator possessed of a term for years, devised the lands to *B.* and to the heirs of his body, and if *B.* should die without issue, living *C.* then to *C.* the court held this a good limitation to *C.* the contingency being to arise within the compass of a life in being.

And again, where a testator devised his term to his wife for life, and after her death to *R. F.* for life,

life, and after her death to *T. F.* and his children, and if the said *T. F.* should happen to die before the expiration of the said term, not having issue of his body *then living*, then to go over to *D.* for the residue of the term; this limitation to *D.* was decreed good, the contingency being confined to a death without issue *then living*; for though it was contended, that the words *then living* related only to the other words *before the expiration of the term*, yet it was answered, that those words must relate to the time of the death, otherwise there would be no difference between this and the common limitation over of a term if one *die without issue*; for there it must be intended *dying without issue before the expiration of the term*, there being nothing to limit over after the expiration of the term.

1 Eq. Abr.
193. Flet-
cher's case.

So an appointment by will to *A.* and if he died without issue under twenty-one, then over to others, was held a good limitation by way of executory devise; as it depended on a contingency to arise within the compass of a life then in being.

Thrustout v.
Denny
1 Will. 207.

It is the same if the *dying without issue* be confined to the compass of 21 years after the period of a life in being.

Vide supra,
P. 318.

This appears in the case of *Maddox* and *Stains* above cited, and will further appear in

Supra 320.

the case of *Stephens v. Stephens*, and in other cases cited hereafter, in respect to the eventual validity of a subsequent executory limitation, where a preceding one happens not to take effect.

Sheffield v.
Lord Orrery.
3 Atk. 282.

Again, in the case of *Sheffield v. Lord Orrery*, where the testator, if he should leave no legitimate son or daughter who should *leave any child behind* them; in such case of their dying without leaving issue behind them, willed and directed, that C. should have his estate both real and personal, &c. one question was, whether the limitation of the personal estate, was not too remote? Lord *Hardwicke* held that the limitation being confined to the period of a life, was warranted by the rules of law; and he observed, that although it was certain that a limitation of a personal thing, could not be allowed after a dying without issue generally; yet if it were confined to the extent of a life or lives in being, or within ten months (or the birth of a child) after a life in being, or to the death of such child before the age of 21, the limitation would be good.

Vide *infra*.

Indeed with respect to executory devises of terms for years, or other personal estates, the court of Chancery has very much inclined to lay hold of any words in the will, to tie up the
generality

generality of the expression of *dying without issue*, and confine it to dying without issue *living* at the time of the person's decease.

Thus where *A.* devised lands to his wife for life, remainder to his son *T.* and his heirs; provided that if the said *T.* should die without issue of his body, then he gave 100*l.* a-piece to his two nieces *C.* and *D.*, to be paid *within six months after the death of the survivor of his said wife and son T.* by the persons who should inherit the premises, and in default of payment as aforesaid, the testator devised the lands to the legatees for payment: this dying without issue was construed a dying *without issue living at his death* (for it clearly appears, that an indefinite failure of issue at any time was not meant, by the legacies being limited to be paid within six months after the death of the *survivor* of the mother and son) and therefore upon the event of such a contingency, the limitation would have taken effect: but as the son died leaving issue, though that issue died within six months after the death of the son, the court held the legacy not due; as the contingency (of dying without issue *then living*) had not happened.

1 P. W. Nicholls v. Hooper 198.

It is said indeed in the report of this case, that where a legacy is given on a *dying without issue*, it shall be understood a dying without issue

Vide 2 Atk.
313.

issue *then living*. But it is to be observed that such a construction was not necessary to make the limitation good in this case, for the reasons I have given; and that such a construction is not allowed, without some restrictive circumstances in the limitation, *Vide Fitz-Gibb. 68. Green v. Rod, and 1 Burrow 272-3, and other cases hereafter cited.*

Target v.
Gaunt.
1 P. W. 432.

So where a testator devised to his son *A.* for life, and no longer, and after his decease to such of *A.*'s issue as *A.* should by will appoint; and in case *A.* should die without issue, then he devised the lands over. These words upon the whole of the will were construed to mean issue living at his death; because it was to be intended such issue as *A.* should or might appoint the term to, *viz. issue then living.*

1 P. W. 534.
Hughes v.
Sayer.

Again, where *C.* having two nephews *A.* and *B.* devised the surplus of his personal estate to them, and if either of them should die without children, then to the survivor. It was held that dying *without children* must in this case be taken to be dying without *children then living*; because the immediate limitation over was the *surviving* devisee—So where *A.* devised portions to his four children, payable at their respective ages of 21 or marriage, and in case any of them should die before the time of payment, or *without issue*, then his or their portion

Chanc. Prec.
528. Nicholls
v. Skinner.

portion to go to the *survivors or survivor*, and his heirs : it was held this could not be a dying without issue generally, but so as the survivor might take ; which must be during the life of some one of them, and so was good.

And where the testator made his wife executrix, and gave her all his goods and chattels, provided that if she should die *without issue* by the testator, then *after her decease* 80 l. should remain to the testator's brother ; the words *then after* were taken to mean *immediately after*, and consequently to restrain the dying without issue to the time of her death.

Pinbury v. Elkin.
1 P. W. 563.
Vide Paine v. Stratton, *infra*.

So where a term was devised to *A.* for life, remainder to such children as the testator should leave at the time of his death, and if all such children should die without *leaving* any issue, then to *B.* : this was a good executory devise to *B.* and the words " Without *leaving* any issue " were understood to mean " *leaving any issue at the time of their deaths.* " — Again, where one devised a personal estate, in trust, to be settled on his daughter *or the heirs* of her body, but in case his said daughter should die, *leaving* no heirs of her body, then over to others ; Lord *Hardwicke* decreed the limitation over good, upon the contingency of the daughter's dying without issue *living* at her death ; as he considered the word *leaving* as relating to that time.

3 P. W. 258.
Atkinson v. Hutchinson.
Vide same point.
1 P. W. 663.
Förth v. Chapman, *cit- ed infra*.

2 Atk. 642.
Read v. Snell.

So

3 Atk. 396.
Lampley v.
Blower.

So in another case, where the testatrix gave her two nieces *F.* and *L.* each one half of the produce of bank stock, and to *their issue*, and if either of them should happen to die before the legacy became due to her, and leave no issue, the share of her so dying should go to the survivor; the words *and leave no issue* were construed "leave no issue *living* at the time of "her death."

Smith v. Cle-
ver.
2 Chan. Rep.
410, & vide
same case
2 Vern. 38.

It has indeed been held, that where the *interest* of money was devised to one for life, and if he die *without issue*, the principal to go over; that such a limitation was good; upon a distinction taken, between the devise of the interest of money, and of money itself. But that distinction has been repeatedly over-ruled and exploded, as appears in the above cited cases of *Butterfield v. Butterfield*, and of *Daw v. Pitt*.

Supra, page
347.

1 Lev. 35.
Goodwin v.
Clerk. 2 Sid.
102.

There is a case of a very different nature from the foregoing, where a portion for a daughter limited after an indefinite failure of issue-male was allowed to take place. It was the case of a settlement on husband and wife, for their lives, remainder to the first, &c. son in tail-male, and if the husband should die *without issue male*, remainder for a term to raise 1500 l. for portions for daughters; the husband died, leaving issue a son and a daughter;
the

the son died without issue; it was adjudged that the daughter should have the 1500*l.*; for that whenever the issue-male of the husband failed, he might properly be said to be dead without issue-male: here we observe, as there was a preceding estate-tail, a recovery suffered by tenant in tail would have barred this term, and the daughters portions; and therefore the allowing the limitation to take effect, was not running into the inconveniences of an executory devise, limited on so remote a contingency; because this limitation was liable to be barred, whereas an executory devise is not.

But though the courts, in the case of *personal estates*, generally incline to pay attention to any circumstance or expression in the will, that seems to afford a ground for construing a limitation after dying *without issue*, to be a dying without issue *living at the death* of the party, in order to support the devise over: Yet in the case of a real estate, it seems the construction is generally otherwise; for there we are to consider the interest of the heir at law is concerned; which is always much favoured by our laws.

Therefore, where a testator gave the residue of his real and personal estate to his nephews *W.* and *G.* and if either of them should depart
this

Forth v.
Chapman.
1 P. W. 667.

this life, and *leave no issue* of their respective bodies, then he gave the said premises to D. Here Lord C. Parker observing that the devise carried a freehold as well as a leasehold, nevertheless, thought it might be reasonable enough to take the same word in two different senses, as to the two different estates; and that as to the freehold, the construction should be, if W. or G. died without issue, *generally*, and as to the leasehold the same words might be construed to mean a dying without *leaving issue at their death*.

Vide 3 Atk.
288.

Mr. P. Williams indeed, in a note upon this case, says, that, by the will the limitation over was expressly restrained to the leasehold, though in Lord Macclesfield's notes that word was omitted. But it seems that Lord Hardwicke in the case of *Sheffield v. Lord Orrery* observed, that Mr. Williams is mistaken in that note, for that upon looking into the case, it appeared, that both freehold and leasehold were devised by the same words.

Walter v.
Drew.
Com. Rep.
373.
And vide 2
Vez. 615.

Again where a testator having two sons W. and R. devised, that if W. his eldest son should happen to die, and *leave no issue* of his body lawfully begotten, that then and in that case, and not otherwise, after the death of W. his said son, he gave and bequeathed all his lands of inheritance in L. unto R. to have and to hold the same

same after the death of the said *W.* to him and his heirs; it was held, that *W.* took an estate-tail by implication; and that the limitation to *R.* was a remainder, and not an executory devise.

We may observe, that in all these cases of personal estates, where such restrictive circumstances as I have been instancing, appear, it matters not whether the term or other personal estate be limited to the first devisee or legatee indefinitely, as in the above cited cases of *Hughes v. Sayer*, and *Forth v. Chapman*; or for life expressly as in *Target v. Gaunt* above cited; or to such legatee and *his heirs*, or *heirs of his body*, or *issue*, or *children*, as in the cases of *Lamb v. Archer*, *Read v. Snell*, *Lampley v. Blower*, and *Fletcher's case* above cited; for the restriction it seems is equally valid under any of those circumstances, and gives effect to the limitation over.

A diversity has in some cases been contended for, between a limitation of a term, by such words as in the case of a real estate would give an *express* estate-tail, and a limitation of the same by such words, as in the case of a real estate would only give an estate-tail by *implication*; upon this principle; that where the words of a will, if used with regard to an inheritance, would give an *express* estate-tail, there the same words applied to a term will pass the whole interest in that term; but that, where

Vide 1 P. W.
433.
3 P. W. 260.

the

the words of the will, if applied to a freehold, would give an estate-tail by *implication* only, there they will not enure to give the whole interest in the term; and consequently, that where a term is limited to one, and if he die *without issue*, remainder over, this limitation will not vest the whole term in him, as a limitation to the *heirs of his body* or to *his issue* would do; but are always to be understood restrictively, and to relate only to his dying without issue *living at his death*, and therefore give him the term only during his life.

Vide 1 P. W.
667.

The ground of the distinction is this; in respect to an inheritance, the words *dying without issue*, are taken to mean an indefinite failure of issue, in order to create an estate-tail in favour of the issue; who are capable of taking *an inheritance*; but with respect to a term, such a construction cannot benefit the issue, because *a term* cannot descend to them. In some instances, it is true, the court seems to have countenanced a distinction of this sort; as appears in *P. W.*'s reports of some of those cases which I have last cited from him; but in all those cases, as I have before noticed, there were some circumstances in the will, which the court observed confined the generality of the expression, *dying without issue* to *dying without issue then living*. This appears in the reports of the respective cases, except in that of *Fo. th* and
Chapman,

Chapman, in which *P. Wms.* does not notice the court's regard to the particular penning of the will. But Lord *Hardwicke* it seems in the case of *Beauclerk v. Dormer* observed, that he was counsel himself in that case of *Forth* and *Chapman*; and that by the note he took on the back of his brief it appeared, that Lord *Macclesfield* laid a good deal of weight on the words, and *leave* no issue. And again in the case of *Sheffield v. Lord Orrery* it seems Lord *Hardwicke* said that Lord *Macclesfield* decreed the limitation in *Forth v. Chapman* good upon the word *leave* no issue; and in the case of *Garth* and *Baldwin* it was again observed, that in *Forth* and *Chapman* the court went on the word *leaving*.

Forth v. Chapman.
vide *supra*,
p. 362.
2 *Atk.* 313.

3 *Atk.* 288.

2 *Vez.* 649.

It is obvious, that if the court had grounded their decisions on the distinction I am speaking of, it would have been needless to have inquired into, or insisted upon those circumstances of restriction, upon which, in delivering their opinions, they laid so much stress. Besides, where no such circumstances have appeared, it has been determined, that the limitation of a term over after a *dying without issue*, even in such cases where the limitation could only have given an estate tail by implication in a real estate, is to be taken in the legal extent of the expression; and therefore the limitation over being (in that sense) too remote,

is

is utterly void. This appears in the case of *Love and Wyndbam* before cited, where the first limitation was not even indefinite, but was expressly restrained to the life of the legatee.

2 Freem 210.
Burford & Lee.

2 Freem. 287.
anon.

So where a lessee for 1000 years without impeachment of waste, devised to *L.* and if he should die without issue, then to *B.*; the court held that the remainder was void, and that the whole vested in *L.* his executors and administrators.—And where a personal estate was devised to *A.* and in case she should die without issue, then to *B.* it was resolved that the devise over to *B.* was void, and the whole decreed to *A.*

Fitz. Gibb.
68.
Green & Rod.

Again in a later case, where *A.* possessed of a personal estate, appointed by will, that it should be sold, and the money arising from the sale be to the use of his sister *M.* and if she should die without issue, it should go equally between his other sisters; and in a subsequent clause it was said, *then after the death of his sister M. in manner aforesaid, &c.* There it was contended, that although the first limitation to *M.* contained nothing to restrain the generality of the meaning, *of dying without issue*; yet the words in the subsequent clause *then after the death* amounted to a restriction, which confined it to a dying without issue *living at the death of M.* But the court observed that the words in *manner aforesaid*, prevented such a construction;

construction ; because they referred to the first limitation, and were tantamount to a repetition of it ; which being a dying without issue generally, the limitation over was too remote, and therefore void.

These authorities directly overturn the distinction above-mentioned in both its points, *i. e.* as well in respect to the validity of the subsequent limitation over, as in regard to the whole not vesting in the first devisee or legatee.

And though Lord *Talbot* seemed to admit the distinction in the case of *Atkinson v. Hutchinson*, yet it was only by way of auxiliary argument ; he by no means appears to have founded his opinion or decree in the case upon it ; nor indeed was there any call for it ; for the words there, were, without *leaving issue*, the import of which I have considered ; and in regard to which words Lord *Talbot* observed, the case of *Forth and Chapman* was in point, as there could be no difference between the words *without leaving issue*, and *leaving no issue* ; he founded his decree therefore upon the precedents in point. And it is further observable, that in *Atkinson v. Hutchinson* there was a preceding limitation upon the death of any of the children without *leaving issue*, to the *survivors* of them ; now this strictly was not applicable to an indefinite failure of issue, because
confined

Atkinson v.
Hutchinson.
supra 359.

is utterly void. This appears in the case of *Supra*, p 342. *Love* and *Wyndbam* before cited, where the first limitation was not even indefinite, but was expressly restrained to the life of the legatee.

2 Freem 210. So where a lessee for 1000 years without im-
Burford & Lee. peachment of waste, devised to *L.* and if he should die without issue, then to *B.*; the court held that the remainder was void, and that the whole vested in *L.* his executors and administrators.—And where a personal estate was devised to *A.* and in case she should die without issue, then to *B.* it was resolved that the devise over to *B.* was void, and the whole decreed to *A.*

2 Freem. 287. anon.

Fitz. Gibb. Again in a later case, where *A.* possessed of
68. a personal estate, appointed by will, that it
Green & Rod. should be sold, and the money arising from the sale be to the use of his sister *M.* and if she should die without issue, it should go equally between his other sisters; and in a subsequent clause it was said, *then after the death of his sister M. in manner aforesaid, &c.* There it was contended, that although the first limitation to *M.* contained nothing to restrain the generality of the meaning, *of dying without issue*; yet the words in the subsequent clause *then after the death* amounted to a restriction, which confined it to a dying without issue *living at the death* of *M.* But the court observed that the words in *manner aforesaid*, prevented such a construction;

construction ; because they referred to the first limitation, and were tantamount to a repetition of it ; which being a dying without issue generally, the limitation over was too remote, and therefore void.

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confined

*Atkinson v.
Hutchinson.
supra 359.*

confined to a *survivor*; and it was but reasonable to give the same words the same construction in the subsequent limitation, which they must bear in a limitation immediately preceding, applied to the same subject.

2 Atk. 308.
Beauclerk v.
Dormer.

And so in a case of later date, where the testator said, M. D. *I make my sole heir and executrix, and if she die without issue*, then to *L. B.* Lord Hardwicke held, that no authority came up to supporting the point, that *ex vi termini* such a limitation of a personal estate should be confined to a dying without issue *living* at the death of the first taker; and that as the limitation was general, and not restrained by any circumstance in the will, the devise over was void. And his Lordship was of the same opinion in a subsequent case, when he said, "Where there is a devise of a lease for years to a man, and if he die without issue, remainder over; there is no doubt but the whole interest vests in the first taker."

2 Atk. 376.
Saltern v.
Saltern.

Jan. 1768.
Keily v.
Fowler.

Indeed, since the case of *Beauclerk v. Dormer*, there has been the case of *Keily v. Fowler* determined in the House of Lords, upon an appeal from the court of Chancery in *Ireland*: where *W. C.* left and bequeathed, unto his daughter and only child, all his worldly substance, lands, stock, corn, debts, and household goods,

goods, provided she married by the consent of his executors *therein mentioned*: but in case she married without the consent of his executors, she was to have only twenty cows and a horse for her whole fortune: and after naming *A.* and *B.* his executors, he appointed, that in case his said daughter should die *without issue*, all his said substance should *return back to his executors*, to be distributed as he should thereafter direct. — And lastly, in case his daughter should marry without consent, or die *without issue*, he appointed that all his said substance, &c. should return back *to his executors*, to be *by them* distributed in manner following; *viz.* to his nephew *J. D.* 100*l.* to *H. G.* 50*l.* to each of his *executors aforesaid* 50*l.* to his daughter twenty cows and a horse only, and the remainder to be equally divided amongst the children of his sister *E. F.*

The question was, whether the limitation over of the personal estate after the death of the testator's daughter *without issue* was good? The court of Chancery in *Ireland* held it was: and their decree was confirmed by the House of Lords here, upon the opinion of the Judges, that the bequest over was to take effect on the death of the daughter without *issue then living*.

Now in this case, we may observe, a material circumstance restrictive of the general import of the words *die without issue*; which was, that in such event, the estate, &c. was directed to *return back* to his executors, to be distributed by *them* (*viz.* the executors he had named, for upon the same event he gave to *each of his executors* *aforesaid* 50*l.*) Now this was a *personal* trust in those particular executors, to be performed by *them*, after the determination of the first estate by either of the two events, of his daughter's marriage without consent or her death without issue. Therefore we must suppose the testator to have considered both these events to be such, as if they happened at all, would in all probability happen in the life-time of his said executors, or one of them; otherwise we make him repose a trust in his executors, inconsistent with a probability of their living to perform it.

But a general indefinite failure of issue is an event, in contemplation, too remote to be confined to the period of any life in being; therefore it was reasonable in this case to construe the words *dying without issue*, dying without issue *then living*; in order to reconcile the extent of the limitation to his daughter, to the nature of the trust reposed in his executors, and make the whole will consistent. As to any thing that might be inferred from the devise over to his sister's children being intended as a
personal

personal provision for them, as much may in all cases be inferred from a devise over to any relation or other person; and therefore I conceive amounts to nothing at all: nor indeed did the case want any further assistance; for the circumstance respecting the trust in his executors, was particular and strong.

I therefore apprehend, the judgment in the case of *Keily and Fowler*, does not at all clash with the decision of Lord *Hardwicke* in the case of *Beauclerk v. Dormer*. But that both those cases concurred, in confirming the very same distinction in regard to the effect or validity of an executory limitation of personal estate after a *dying without issue*, under different circumstances of latitude or restriction, as the whole series of preceding cases seems to have furnished us with, if we class and estimate the resolutions in these cases according to the several grounds on which they appear to have been founded; and that the distinction thus to be collected, from a general comparative view of all the cases upon this point, appears to be no more nor less than this, viz.

That although in the limitation of a personal estate, after a *dying without issue*, those words shall not *ex vi termini*, and without the concurrence of any other circumstance of in-

tention, signify a dying without issue *then living*, even though the limitation is in the nature of an estate-tail by *implication* only; yet on the other hand they shall not *ex vi termini*, when there *is* any other circumstance of intention, import an *indefinite* failure of issue, even though the limitation is in the nature of an *express* estate-tail; but that in either case, if the limitation rests solely upon the usual extent and import of those words, the limitation over is too remote, and therefore void; and the whole vests in the first devisee or legatee; but that in either case, the signification of these words may be confined to a dying without issue *then living*, by any clause or circumstance in the will, which can indicate or imply such intention.

1 Eq. Abr.
362. pl. 12.

But however, it has been said, that where a personal estate was limited to one *for life expressly*, and if he die *without issue*, remainder over, such remainder over was good; because the express estate for life should not be enlarged by mere words of implication. The place cited for this point in 1 *Eq. Abr.* is 1 *Chanc. Rep.* 411. which must be an error in print, for there is no such page or case in the book; in 2 *Chanc. Rep.* 410. indeed, there is the case of *Smith v. Clever*, which is also reported in 2 *Vern.* 38. in which case it was held,
where

Vide supra,
p. 360.

where *interest* of money was bequeathed to one for *life*, and if he should die *without issue*, the *principal* to remain over, that the limitation over was good. But that decision turned upon a different principle; for that case was determined upon a distinction taken, between a bequest of the *interest* of money to one for life, and a bequest of the money itself. A distinction which appears to have been since exploded in the cases of *Butterfield v. Butterfield*, and of *Daw v. Pitt* before cited. And indeed from the general tenor of the cases cited in the preceding pages, it may be collected, that, with respect to the validity of the limitation over, it is the same thing, whether the devise of a personal estate be to one for *life* expressly, and if he die *without issue*, remainder over; or to one (indefinitely) and if he die *without issue*, remainder over. Thus in the case of *Love v. Wyndham*, the devise was to one for life *expressly*, and if he die without issue, remainder over; and yet the remainder was held void.

Vide supra,
P. 347. 36c.

Supra, p. 342.

So in a case where a testator devised a term to trustees in trust for his son *T.* for so many years of the term *as he should live*, and after his decease, in trust for the issue-male of *T.* lawfully begotten, for so many years of the unexpired term as such issue-male should live, and when the issue-male of his said son should happen

Clare v.
Clare.
Cas. Temp.
Talb. 21.

pen to be extinct, then in trust for his second son *W. for life*, remainder over, &c. and made *T.* sole executor and residuary legatee; *T.* died without issue-male; though Lord *Talbot* held in this case that the subsequent limitation to the issue did not enlarge the *express* estate for life given to the first devisee; yet he also held that the remainder over upon the extinction of issue-male, (which is equivalent to a *dying without issue*, when taken as an *indefinite* failure of issue) was void; and that *T.* became intitled to it by the residuary bequest to him.

If there is any difference between a limitation of a term, &c. to one *for life* expressly, and if he die without issue, remainder over; and a limitation to one *indefinitely*, and if he die without issue, remainder over; it seems to be this; that in the latter case, (where there are no restrictive circumstances to confine it to a dying without issue *then living*) the whole vests in the first devisee; whereas in the former it may, in some instances at least, be considered as returning to the executors or personal representatives of the testator, after the death of tenant for life.

Supra, p. 366.
and vide 2
Siderf. 151.
and Saltern v.
Saltern supra,
p. 368.

That in the latter case (where there is no such restriction as above mentioned) the whole vests in the first devisee or legatee, appears from the above cited case of
Burford

Burford v. Lee, and the other case cited from *Freeman*; as well as from other cases which might be cited: and that in the former case, it may sometimes be considered as returning to the executors of the testator, seems to be an inference afforded by the above cited case of *Clare v. Clare*; where Lord *Talbot* held, that the limitation to the issue did not enlarge the express estate for life, and consequently that *T.* did not take the whole term by virtue of the limitation; but that the residue of the term, after his life-interest, vested in him as residuary legatee of his father. Supra, §. 373.

For though it seems, that wherever a term is devised to one for a day, or an hour, it is held to be a devise of the whole term, if the devise over be void, and it appear to be the intention of the testator to dispose of the whole from his executors: Yet, if such intention does not appear, then it has been held, that a limitation of a term to one for life, does not vest the whole so absolutely in him as to be at his disposal, but leaves a possibility, (*viz.* upon the death of the devisee within the term) of reverter in the executors of the testator. Vide 1 P. W. 665.

Thus where *A.* possessed of a term for 99 years, devised it to *B.* for life, and then to *C.* for life, and so on to five others successively for life; after the death of all seven, upon the question 1 Salk. 231.
Eyes v.
Faulkland
and vide
Pollex. 32.

question who should have the residue of the term, it was adjudged to revert to the executors of the testator.

Upon the distinction between a dying without issue generally, and a failure of issue confined to the period of a life in being; it seems to follow, that though an executory devise *in tail* or *in fee* to one *in esse* after a dying *without issue*, is void; yet an executory devise *for life* to one *in esse*, to take place after a dying *without issue*, may be good; because in the latter case, the future limitation being only for *life* of one *in esse*, it must necessarily take place during that life, or not at all; and therefore the failure of issue, in that case, is confined to the compass of a life in being.

Oakes v.
Chalfont.
Pollexf. 38.

Upon this principle it appears that the resolution in the case of *Oakes v. Chalfont*, may be accounted for and maintained; where a term was limited in trust for one for life, then for his wife for life, then for *E.* for life, then for his children for their lives, and *for want of such issue*, to *J.* for life, then to his children for their lives, and for want of such issue, then to *S. C.* for life, with other limitations over. The first devisee and his wife died, and *B.* and *J.* died without issue; and upon the question, Whether the limitation to *S. C.* was good?

good? It was adjudged that it was good. Here we observe, the limitation to S. C. was only for life, so that if all the preceding trusts did not fail or expire in the life-time of S. C. that limitation could not take effect; and consequently it was confined to the period of a life in being, viz. the life of S. C. and therefore did not create a perpetuity.

So in another case, where *A.* tenant for life, demised to trustees for 99 years, *if she should so long live*, in trust for herself during her widowhood, and after her marriage, then in trust for *C.* her second son and the heirs of his body, and if he died *without issue*, then in trust for *D.* her next son: Upon the question, whether the limitation over to *D.* was good? It was said, that the only objection to limiting a term to one and the heirs of his body, and then over in default of issue, was, because it would make a perpetuity; but here the whole term being to determine on *A.*'s death, there could be no perpetuity; nor, indeed, could there, for the subsequent limitation could not possibly take effect, unless it was in the life-time of *A.* The court it appears, gave no opinion on this point; but the reporter (with good reason, as it seems) adds "*ideo quære*, tho' it seems rather to be a good limitation of the trust, and within the reason of the Duke of

2 P. W. 608.
in case of
King v. Cor-
ton.

"*Norfolk's*

"*Norfolk's* case and the several other subsequent resolutions grounded thereupon."

Vide 3 Atk.
449.

And upon the same principle Lord *Hardwicke* observed, that if a man limits a sum of money, on failure of issue of the bodies of husband and wife, to any other person *in tail*, it would be void as an executory devise; being too remote as depending upon a dying without issue *generally*; but where the limitation over is *for life*, there it is a reasonable construction to confine it to a failure of issue during a life in being; which had been held in the cases of executory devises to be good, if it fall within the compass of ever so many lives in being at the same time.

**Of other Matters relating to executory
Devises.**

WE have seen, in the preceding part of this treatise, that in respect to limitations of real estates, where an estate for life is given to the ancestor, followed by a limitation to his heirs general or special, the subsequent limitation vests in the ancestor, and the heir takes not by *purchase*. But in the limitation of personal estates, a similar rule does not always hold. If a term be devised to one *for life*, and afterwards to the *heirs of his body*, these words are generally words of *limitation*, and the whole vests in the first taker : as is evident from several of the cases before cited.

Dod v. Dickinson. Vin. vol. 8. f. 451. pl. 25.
Supra, p. 346.
2 Atk. 376.
3 Atk. 398.
And vide Daw v. Pitt supra p. 347.

So where a term was limited in trust for *S.* during her life, and *immediately* from and after her decease, to the heirs of the body of *S.* lawfully to be begotten, if the term should so long endure, and in default of such issue, then to *B.* Lord *Hardwicke* expressed himself of opinion, that the whole term vested in *S.*

Theobridge v. Kilburne 2 Vez. 233.
Vide infra, p. 283.

And again, where real and personal estate was devised to trustees in trust to pay the profits to *G.* during his life, and afterwards to pay the same to the heirs of his body ; Lord *Hardwicke* held that the personal estate vested absolutely in *G.* by this limitation.

Garth v. Baldwin. 2 Vez. 646.

However,

However, if there appears any other circumstance or clause in the will, to shew the intention that these words should be words of purchase, and not of limitation, then it seems the ancestor takes for life only, and his heir will take by purchase.—I shall first instance this in two cases of limitations of the trusts of a term in marriage-settlements. But I have before observed, that executory devises and the limitations of the trusts of a term, are governed by the same rules.

Supra, p 354.

Peacock v.

Spooner.

2 Vern. 43.

195.

2 Freem. 114.

2 Vern. 362.

2 Freem. 231.

Dafforne v.

Goodman.

Thus where a term for 900 years was assigned in trust, to permit the husband and wife, and the survivor of them, to receive the profits for so many years as they, or the survivor of them, should happen to live, and after their deaths, to the use of *the heirs of the body* of the wife by the husband to be begotten; Lord Chancellor *Jefferies* decreed that the whole vested in the wife; but afterwards the Lords Commissioners decreed that the heir of the body took by purchase, and that it did not vest absolutely in the mother who survived, so as to go to her administrator. This last decree was afterwards affirmed in the House of Lords, though the Judges were six to two against it. The same point was afterwards decreed in a similar case of *Dafforne v. Goodman*; where a term was assigned in trust to permit *J.* to receive the profits for so many years

years of the term as he should live, and after his death to permit *A.* his intended wife to receive the profits for so many years of the term as she should live, and after both their deaths, to permit the heirs of the body of *A.* to be begotten by the said *Y.* to enjoy the lands for the residue of the term. This latter decree was grounded on the authority of the preceding.

It is true no particular expression in either of these cases, determined the intent to be, that the heir of the body should take as a purchaser; but these being cases of marriage settlements, it was reasonably enough inferred, that the issue of the marriage were intended objects of the settlement, and the term not designed to vest wholly in the mother. But afterwards, in a subsequent case of a marriage-settlement, a decree at the Rolls, grounded upon the case of *Peacock v. Spooner*, was reversed, and the limitation to the heir-male decreed to be void.

The case was this: On the marriage of *A.* his grandfather assigned a term for 100 years in trust for *A.* for life, then to *A.*'s wife for life, and after their deaths for the heirs of the bodies of *A.* and his said wife: the wife died leaving issue, *A.* survived; it was determined that

1 P. W. 132.
Web v. Web.

And vide
1 P. W. 360.
Hayter v.
Rod. supra,
the P 343.

Vide 2 Vez.
660.

the whole term vested in *A*.—This last case appears to have been the ruling authority ever since in cases of the like nature ; and that of *Peacock v. Spooner*, it seems, is only attended to in cases exactly the same in *specie* with itself, as was that of *Dafforne v. Goodman*, as reported by *Freeman*.

2 Atk. 89.
Hodgson v.
Bussey.

But there have been other cases, which have proceeded entirely upon circumstances of evidence of the intention. As where a term was settled in trust for one if she should so long live, and after her decease, in trust for her husband if he should so long live, and after his decease, in trust for the heirs of the body of the wife, begotten by the husband, and *their executors, administrators and assigns* ; Lord *Hardwicke* decreed, that the limitation to *the heirs of the body*, &c. were words of purchase, as he held the addition of the words *executors, administrators and assigns*, strong evidence of the intent to give only an usufructuary interest for life, and to vest the property in the heirs of the body.

Vide *Barnardist. Rep. in*
Chanc. 199.
2 Vezey 660.

Read v. Snell.
2 Atk. 642.
Supra, p 359.

The like point was decreed in the case of *Read v. Snell* before cited ; in which case the decision was grounded on the words *leaving no heirs of her body*, which were considered as relative to the time of her death, and therefore restrained

restrained the general import of the preceding limitation to the life only of the first taker.

And in this case of *Read v. Snell*, Lord *Hardwicke* cited the case of *Paine v. Stratton*; where *P.* bequeathed personal estate to *S.* for life, and after her decease to the heirs of her body lawfully begotten or to be begotten; and for want of such issue or heirs of her body as aforesaid, he gave the same to the children of *M.* immediately after the decease of *S.* These words, *after the decease of S.* it seems had been interlined, and afterwards erased; and Lord *Macclesfield*, and afterwards the Lords Commissioners, though they held the limitation over void, because these words were not admitted to be part of the will, yet seemed to think it would have been otherwise, if these words had not been erased.

Paine v.
Stratton.
2 Atk. 647.
cited.

And so indeed in the above cited case of *Theebridge v. Kilburne*, though Lord *Hardwicke* was rather of opinion, that the whole term vested in *S.* and that there was no ground for any other construction unless from the word *immediately*, which he thought was too precarious; yet he seemed not to be very confident that the limitation to the heirs of the body might not, even in that case, operate as words of purchase: and held that the limitation then would have vested in the son of *S.* who died

Supra, p 379.

Vide 2 Vez.
236.

an

an infant in her life-time, though he did not live to answer the description of heir; for that it would then amount to the same thing as if it had been to the *issue* of her body; and that where the words heirs of the body, when taken to be words of purchase in such a limitation, have been construed in the sense of issue, it was never held necessary that the issue should survive the first taker, so as in strictness to be heir; for that it was not like a limitation to the heir of the body in the *singular number*, which would be such a description as to shew, that such person as was strictly heir should take.

V. 3 Atk. 398.
in case of
Lampley v.
Blower.
Supra, p. 360.

And again, a limitation of a term to *A.* and to *her issue*, it seems, vests the whole in *A.* if the devise rests there, though the addition of the subsequent words, and if *A.* die *and leave* no issue, Lord *Hardwicke* said, related to any child living at *A.*'s death, and therefore shewed, that such issue was to take after *A.*'s death, and consequently the word *issue* there was to be considered as a word of purchase.

Warman v.
Seaman.
Fin. Chan.
Rep. 279.
And vide
Clare v. Clare.
supra, p. 373.

But a devise of a term to *A. for life*, and afterwards to his issue, it seems, does not enlarge the estate to *A.* but after his death, the whole vests in the issue.

It

It seems formerly to have been held in some cases, that an executory devise of a term to a person not *in esse* was void; but that point is long since settled to the contrary, and it is certain, that any executory devise, whether to a person *in esse* or not, is good, if confined to take effect within the limits before expressed.

1 Mod. 54.
Pollex. 32.

Vide Stephens
v Stephens,
&c. *infra*.

I shall next proceed to some observations in respect to certain limitations of subsisting leases for lives, which neither have the effect of regular limitations of estates of inheritance, nor yet operate as executory devises. Thus it is if a person seised of an estate *pur autre vie*, devises it to one (*indefinitely* or for life) and to the heirs of his body, or to one and his heirs and if he dies *without heirs of his body*, or, in general to one in such manner as would give him an *estate-tail* in lands of inheritance, the limitation, in these instances, makes no estate-tail properly so called; for all estates tail must be of inheritance; nor are these limitations executory devises; but it appears, that the limitation to the heirs of the body may carry the estate to them, and a remainder over may take effect, if the person intitled by virtue of the limitation in tail makes no disposition of the estate. But the person intitled under the limitation in tail, it seems, may if he thinks fit dispose of the whole, and bar as well the remainder over, as his own issue.

C c

That

Low v.
Burron.
3 P. W. 262.

That a remainder over is not void, and that the issue may be barred, appears in a case, where *J. C.* seised of an estate for three lives, devised the lands to his daughter *M.* for life, remainder to her issue male, and for want of such issue remainder to *L.*, afterwards *M.* in consideration of an intended marriage, conveyed the lands to the use herself and her intended husband, and the heirs of their bodies, remainder to the heirs of her intended husband. *M.* died without issue, and upon a claim under the remainder man *L.* the question was, whether the remainder of an estate *pur autre vie* to *B.* after a devise thereof to *A.* in tail was good; and if so, whether it might be barred by *lease and release*.

The court agreed, that the limitation of an estate *pur autre vie* to one and the heirs of his body, makes no estate tail; for all estates tail are estates of inheritance, to which dower is incident, and must be within the statute *de donis*; but in the limitation of an estate *pur autre vie*, there was no inheritance nor dower, nor was it within the statute, but was only a descendible freehold. And Lord Chancellor held it was a good remainder to *B.* on the decease of *A.* without issue, it being no more than a description who should take as special occupant during the life of *cestui que vie*. And his Lordship said, that though by *lease and release* *A.* might bar the heirs of his body as in some measure

measure claiming under him, yet he inclined to think that *A.* could not bar the remainder over to *B.* especially by the conveyance by lease and release; nay indeed it seemed to him as if no act of *A.* could bar the limitation to *B.*

But however, that the remainder over, as well as the issue, may be barred in such cases, appears by another decision: where *D.* a feme covert, being tenant for life, remainder to her first and other sons by a former husband in *tail male*, under a devise of lands held by lease for three lives, *S.* the son of *D.* by her former husband, brought his bill to have the lease renewed and settled on *D.* for life, remainder to *himself and his heirs*; the court conceived it could not be done, till a fine *sur concesserunt* was levied by *S.* and *D.* and her husband, (for *D.* we find was under coverture) but that being done, and an assignment of the lease (by lease and release) to new trustees being made, the court ordered that the new lease should be to the new trustees upon the trusts so desired. The reporter adds, that it seems reasonable, that the first tenant in tail (improperly so called) should be allowed to bar the limitations over; for though the original lease be only for three lives, yet it being the interest of both landlord and tenant that the leases should be renewed, and it being the doctrine of the court of Chancery, that all such new leases

Duke of
Grafton v.
Hanmer.
3 P. W. 266.
in the Note.

are subject to the old trusts, the estate might by this means continue for ever, without any possibility of being barred.

Baker v.

Bayley.

2 Vern. 225.

And indeed in a former case, where *A.* having settled an estate, which he held for three lives, to the use of himself in tail, remainder to *D.* surrendered the old lease, and took a new one to himself; *D.* brought a bill to have the benefit of the remainder preserved to him; the court held the remainder void, and dismissed the bill, saying, that if it were good, it might be barred by *deed* or *surrender*, or *other conveyance*, without a common recovery.

Norton v.

Frecker.

1 Atk. 524.

And so where *N.* holding lands to him and his heirs for three lives; upon his second marriage, settled the same to the use of himself for life, remainder as to part to the use of his first and every other son in tail-male, remainder to his own right heirs; and as to the other part to the use of such child or children of the marriage, and for such estates as he should by deed or will appoint, and for want of such appointment to the first and every other son in tail-male, remainder to his own right heirs. There were several children of the marriage; and afterwards, upon the marriage of *R.* the eldest son *N.* by deed, which was also executed by *R.* settles the lands in trust for himself for life, remainder to *R.* for life, and if he should die without

without issue male of his body, remainder over.

Upon a claim after the decease of *R.* without issue, by a son of a younger son of *N.*'s second marriage, Lord *Hardwicke* was of opinion, that by virtue of the remainder limited to the first and other sons in the first settlement, the plaintiff would be intitled, if nothing had been done subsequent to bar his right. He said, that in the case of *Wasteneys* and *Chapple* in the House of Lords in 1712; it was determined, that in respect to estates thus granted in fee determinable on lives, a person may take by way of remainder as a special occupant; but that as such an estate-tail is not within the statute *de donis*, nor barrable properly by a recovery as an estate tail, any limitations depending thereon are intirely in the power of the first taker in tail, and may be destroyed by any conveyance or even articles in equity, and that it was so determined in the case of the Duke of *Grafton* v. Lord *Euston*, in 1722, in which his Lordship was counsel himself. — That the latter settlement in the principal case, amounted to a good disposition by *R.* of all the interest claimable by him, or any other in remainder after him; clearly so with regard to the first part of the lands, tenant for life and remainder-man in tail of an interest vested having joined in the conveyance, and limited the estate to other uses; and as to the other part of the lands, though no remainder was

Wasteneys v.
Chapple.

Supra, p. 387.

was *vested* in *R.* yet the father and son both joining amounted to a good disposition of it.

2 Atk. 376.
in *Saltern v.*
Saltern.

So in another case, Lord *Hardwicke* said, that in the case of a devise of a lease for lives to a man, and if he dies without issue, remainder over, the first taker has a power over it during his own life; but if he makes no use of that power, upon his death it vests in the remainder man, who takes as special occupant.

So that now it appears to be settled beyond dispute, that where leases *pur autre vie* are limited to one in tail, he may, by *lease and release* or any other conveyance proper for passing estates of freehold, bar his own issue and all remainders over, and make a complete disposition of the whole estate.

But an estate *pur autre vie* may be limited to one for life, so as to confine his interest and power of disposition to his own life estate only; as where an estate *pur autre vie* is limited to *A.* for life, remainder to *B.* for life, there the first taker cannot bar the remainder. This was clearly held by the court in the above cited case of *Low v. Burron*, for such a limitation in a remainder after a life-estate only, has no tendency to a perpetuity.

Williams v.
Jekyl.
2 Ves. 681.

And in a case, where *A.* having a freehold lease for three lives to her, her executors, administrators and assigns, assigned it and all her right,

right, title and interest in and to the same, to a trustee to the use of her son S. for and during the term of his natural life, and from and after his decease to the use of *his issue* lawfully begotten, and for *want of such issue* to the use of A. her executors and administrators during the residue of the term. Lord *Hardwicke* held, that S. took an interest for his life, and the whole residue of the lease vested absolutely in the issue, for he construed the words *for want of such issue* to mean not *leaving issue*; and that the effect of the limitation was to the son for *life*, and if he had any children, that they should have it absolutely, and if he should have no child, then to A. her executors and administrators.

And vide
Warman v.
Seaman.
supra p. 384.
and Pollex.
122.

And it is the same thing if the first limitation be for 20 lives all spending at the same time, since it amounts to no more than the life of the survivor of them.

Vide 3 P. W.
265.

Here indeed it may not be improper to remark, once for all, that any limitation in future, or by way of remainder of lands of inheritance, which in its nature tends to a perpetuity, even although there be a preceding vested freehold, so as to take it out of the description of an executory devise, is by our courts considered as void in its creation; as in the case of a limitation of lands in succession,
first

first to a person *in esse*, and after his decease to his unborn children, and afterwards the *children* of such *unborn children*, this last remainder is absolutely void ; and there is no carrying the estate to them but by comprising them in the extent of the estate limited to their parents, *namely*, to the unborn children of the person *in esse* ; that is, by giving such unborn children of the person *in esse*, an estate of inheritance, which is an estate-tail, *special* at least.

And it is upon this principle, that the constant practice of limiting an estate-tail to the first and other sons in marriage settlements is founded ; for though a child unborn might take an estate for life as well as an estate-tail, yet such estate would not extend to the issue of such child, and no estate limited to such issue, as purchasers, would be good.

Humberston
v. Humber-
ston.

1 P. W. 332.
and vide 3.
Burrow 1632.
et seq.

Therefore where a testator devised lands to a corporation in trust to convey the said lands to *M.* for life, and after his decease to *M.*'s first son for life, &c. and if no issue-male of the first son, then to the second son of *M.* for life, and so to his first son, &c. with remainders over to about fifty others for their lives successively, and their respective sons when born for their lives respectively, and so on without giving an estate-tail to any of them, or making any

any disposition of the fee. Lord C. *Cowper* held this to be a perpetuity: but that the conveyance should be as near the intent as the rules of law would admit, *viz.* by making all the persons in being but tenants for life, and limiting estates tail to the sons unborn.

With regard to executory devises we are to remember, that wherever one limitation of a devise is taken to be executory, all subsequent limitations must likewise be so taken. This is laid down as a rule by *Serjeant Pemberton* in the case I have cited in the margin; for (says he) the several limitations of a devise of one and the same thing, shall never be made to operate several ways (*viz.*) some by way of executory devise, and others by way of remainder. The court seemed to admit the truth of the position; but it may be worth while to consider upon what reasons it is grounded, for in the course of practice, questions frequently arise, which turn upon this very point.

Vide Carth.
310. Reeve
and Long.

With respect to the devise of a term, it is clear, that if there be 20 limitations of it after a devise to one for life, &c. every one of the 20 will be equally executory as the first of them; because all are equally limitations of a term after a disposition thereof for life, which cannot hold otherwise than by way of executory devise. Therefore the question can only arise
in

Vide *supra*,
p. 303.

in regard to the devise of a freehold; and there we are to consider, that every executory devise is either the limitation of an estate after the fee has already been disposed of, or else is a freehold to commence *in futuro*, without any preceding freehold to support it. In the first case it is evident, that every limitation subsequent to the first executory devise, must be also executory, because it is also a limitation of an estate after the fee has already been disposed of. In the latter case, the first *executory* limitation, being the first freehold limited by the will, no freehold can vest in possession under that will, before the time appointed for such limitation to take effect; if it could, then would that supposed *executory* limitation be really *not executory*, because it would in that case be supported by a preceding vested freehold.

Vide *supra*,
p. 160.

It is true, that in relation to *contingent remainders* a subsequent remainder may *vest in interest* before a preceding contingent remainder, as I have before observed when I was treating of contingent remainders; but that is only where some preceding freehold vests *in possession* in the mean time: but no subsequent remainder can first vest in possession, and afterwards a preceding estate take place; for wherever a subsequent limitation vests *in possession* before a preceding contingent

Vide *supra*,
p. 206.
and *Reeve v. Long*.
4 Mod. 282.

gent one can arise and vest, such preceding one is utterly precluded and destroyed, as we have already seen.

But in the case, now under consideration, there is no freehold limited to vest immediately in possession. We cannot make the preceding estate and the remainder change places, and the latter come into possession before the former; this would be absurd, and directly contrary to the order of the limitations. If this cannot be done, then no one of the subsequent limitations can take place before the time limited for the first; they are all therefore equally freeholds to commence *in futuro*, without any present limitation or estate of freehold, to support them; and consequently are all equally executory, till the time comes for the first estate to vest or fail; then all the subsequent limitations may vest, and no longer continue executory.

Thus where *A.* having two sons *B.* and *C.* devised lands to trustees for 500 years, upon trust to pay an annuity of 50*l.* *per annum* to *B.* for life, and after the determination of that term to the first and other sons of *B.* in tail, remainder to *C.* for life; *B.* at the testator's death had never had a son born; here it was held that till the event of *B.*'s having a son should be decided one way or the other, by the birth of such son, or by *B.*'s death without one,

2 P. W. 23.
Gore v. Gore.

Vide infra.

one, the freehold descended to the devisor's heir at law. Therefore till the birth of such son or *B.*'s death without one, *C.*'s remainder must have been executory, being a freehold limited to commence *in futuro*, without any preceding estate of freehold limited to support it; for the freehold descending to the heir at law of *A.* was no part of the limitation in the will; but only descended in consequence of its not having been thereby limited, and therefore had no connection with *C.*'s remainder in the light of a preceding estate.

But here an observation is to be attended to, that notwithstanding the rule, that if one limitation be executory, every subsequent one must be so likewise; yet a preceding executory limitation may be uncertain and contingent, when a subsequent limitation, tho' it be to take effect in future, may not be uncertain or conditional (otherwise than in respect of the possibility of its expiration before the former vests or fails) but may be so limited as to take effect, either in default of the preceding limitation taking effect at all, or by way of remainder after it, if that should take effect. In either of those cases, we see, it must vest at the time appointed for the preceding limitation to vest; for should the preceding limitation fail of taking effect, the subsequent one will then *vest in possession*; should the preceding take effect, the subsequent one will at the same instant *vest in interest*

interest as a remainder upon the preceding one, and then become liable to the same modes of destruction as other remainders of the same kind are subject to.—Thus, where there was a devise to two trustees and their heirs to receive the rents until *B.* should attain 21; and if *B.* should attain 21 or have issue, then to *B.* and the heirs of his body, but if *B.* should happen to die before 21 *and* without issue, remainder over; *B.* attained his age of 21, and afterwards died without issue: Lord *Hardwicke*, considering the word *and* as used for *or*, and the condition as disjunctive instead of copulative, decreed that the remainder over should take effect, upon the apparent intent of the testator, that it should take place, either in default of *B.*'s attaining 21, or on his dying without issue.

2 Vez. 243.
Brownswold
v. Edwards.
Vide supra
167.

and vide Hay-
wood v. Stil-
lingfleet,
infra.

And where *feme covert*, pursuant to a power, left her husband the profits of certain estates for life, and after his death her estates to her children, if she should *leave any to survive her*, but in case she should leave no such child or children, nor the issue of such child and children, and after the decease of her husband, she gave the estates to *J. K.* making him her sole heir in *default of issue left by her*. Lord *Hardwicke* held, that the children took estates-tail, and not in fee, and that the devise to *J. K.* was a *vested remainder*, and not a limitation to
• take

Southby v.
Stonehouse.
2 Vez. 610.

take effect only on the event, of the testatrix's dying without *leaving* any child or the issue of any *living* at her decease. He said the testatrix had only expressed the double contingency, which there is in the case of every limitation in remainder after an estate-tail, *viz.* there being no issue at all, or all such issue dying without issue.

Collinson v.
Wright.
1 Sid. 148.

1 Eq. Abr.
188. pl. 8.

And vide
Barker v.
Suretees.
Stra. 1175.

We must be careful however to distinguish cases of this nature, from a case where a testator devised to *B.* his son and heir, and if he died before twenty-one, *and* without issue of his body *then living*, the remainder over, &c. *B.* survived the twenty-one years, and it was held that he had a fee-simple immediately, and that the estate-tail was to arise upon a contingency which never happened, as he attained twenty-one: and likewise from a case, where the testator devised land to his wife till his son came to his age of twenty-one years, and then that his son should have the lands to him *and his heirs*, and if he died without issue *before* his said age, then to his daughter and her heirs; it was held to be an executory devise to the daughter, if the contingency happened; and that in the mean time the fee descended to the son, and if he attained twenty-one, though he afterwards died without issue, or if he should leave issue, though he

he died before twenty-one, yet the daughter was not to have the lands; because he was to die without issue, *and* before twenty-one to entitle her.

For in these two last cases we observe the devise to the son was in fee, so as not to admit a regular remainder after it; whereas in that of *Brownsword v. Edwards*, the first devise was in tail; upon which circumstance Lord *Hardwicke* laid so much stress, as to say, that had the first devise been to *B.* and his heirs, the construction he gave could not, he believed, be made; for where there was such a contingent limitation, he did not know that the court had changed the word *heirs* into *heirs of the body*, to make it so throughout; and it may be remarked, that this distinction seems founded upon a principle nearly allied to the grounds of that distinction, which I have stated above, between the cases of *Pells v. Brown* and *Spalding v. Spalding*. Supra, p. 307.

I have already observed, that where a devise is made upon a condition annexed to a preceding estate, that is, where it is made after a preceding executory or contingent limitation, or is limited to take effect on a condition annexed to any preceding estate; if that preceding limitation or contingent estate never should arise or take effect, Vide supra,
p. 163.
the

the remainder over will nevertheless take place, the first estate being considered only as a preceding limitation, and not as a preceding condition to give effect to the subsequent limitation.

This I have instanced in the case of a devise to trustees for eleven years, remainder to the sons of *B.* successively in tail, provided they should take the testator's surname, and if not, or they should die without issue, remainder to the first son of *C.*; and though the devise to the sons of *B.* failed, yet the remainder to the son of *C.* took effect, and the limitation to the sons of *B.* was not held to be a condition precedent to its taking effect.

So where *A.* possessed of a term for years, devised it to his wife for life, and after her death to the child she was then *enseint* with, and if such child should die before the age of twenty-one, then one third part of the said term to his said wife, and the other two thirds to certain other persons; one question was, whether this devise to the wife was good, as the event happened; because the wife was not *enseint*, and so the contingency upon which the devise was made to her, *viz.* the child's death under twenty-one years of age never happened. Lord *Harcourt* held that it was good.

However

Scatterwood
v. Edge.

Supra, p. 163.

1 Eq. Abr.
245 Jones v.
Westcombe.

However, a term was devised to an infant in *ventre sa mere*, if it should be a son, and if it should be a son and die during his minority, then to *G.*; the infant proved to be a daughter; and it was held that *G.* was not intitled. And in another case, lands were devised to *A.* in fee, upon condition he should pay the testator's debts, &c. if he did not, then to *B.*; *A.* died in testator's life-time, and it was held that *B.* took nothing.

Grascott v. Warren.
12 Mod. 128.

Roe v. Fludd
Fortescue's Rep. 184.

But the authority of these last cases has been repeatedly over-ruled, by several subsequent determinations. Thus in the case of *Hopkins v. Hopkins*, where the first devisee died in the life-time of the devisor; the contingent remainders over, as they were not vested at the devisor's death, and the preceding freehold failed, were held to enure by way of executory devise.

Hopkins v. Hopkins.
Cal. Temp. Talb. 44.
Vide *supra*,
p. 231.

And again, in a case in B. R. where the above-mentioned limitation in the case of *Jones v. Westcomb* was brought into question again. *Lee C. J.* delivered the opinion of the court, "That the limitation over was good, "that the devise to the infant being ineffectual, was out of the case, and the law the same, whether the devise immediately pre- ceding the limitation over was originally void, or became so by non-existence or non- entity of the person; for that since the law

Andrew v. Fulham, cited
1 Vez. 421.
1 Will. 107.
3 Burr. 1624.

D d

" allows

“ allows such limitation over, it allows the
 “ waiting for it ; that it was one of those exe-
 “ cutory limitations which depend on some
 “ contingency, on the failure of a preceding
 “ limitation ; none of which take in all the
 “ ways of failing, but still it was the same
 “ thing.”

Roe v. Wick-
 kett, cited
 1 Vez. 421.
 1 Will. 107.
 3 Burr. 1624.

This resolution was upon the leasehold part of the estates which passed by the will. But afterwards the same point, in regard to the freehold lands, came into question before the C. B., which court was of opinion, that the event of no child's being born was a *casus omisus*, concerning which no direction was given by the will, that the rule was, that an heir at law is not to be disinherited but by express words or necessary implication ; so that upon that ground the devise over could not take effect : that *Andrews v. Fulham* being a determination on the leasehold, was distinguishable ; that the plaintiff there had assented to the devise over, and so was concluded : and that there was a difference of construction between the leasehold and freehold, because of the favour shewn to an heir at law.

Gulliver v.
 Wickett.
 1 Will. 105.

Upon this another ejectment was brought in B. R., where *Lee Ch. J.* delivered the opinion of the court, that the devise over was to be considered as a limitation subsequent ; the first

first as a preceding limitation (not a condition) which, whatever way it was laid out of the case, the other took effect.—That the true construction of the will was, that there was a good devise to the wife for life, with contingent remainder to the child in fee, with a devise over, which they held a good executory devise, as it was to commence within twenty-one years after a life in being ; and if the contingency of a child never happened, then the last remainder was to take effect upon the death of the wife ; and the number of contingencies were not material, if they were all to happen within a life in being, or a reasonable time afterwards.

Again, in another case, where the testator gave a sum of money to trustees, to pay the yearly interest and produce thereof to his children after their ages of twenty-one, equally between them, and after their respective deceases, to divide the share of each child among the issue of such child, as the parent should appoint, and for want of appointment, amongst such issue equally at their respective ages of twenty-one years, and in case any such issue should die under that age, the share of the issue so dying to go to the survivors, and *in case* all the *issue* of any of the testator's *children* should die *under twenty-one*, to be divided *equally among all the testator's other children* : P. one of the

Fonereau v.
Fonereau.
3 Atk. 315.

testator's children died, after attaining the age of twenty-one, *without having had any issue*. And the question was, whether his share was absolutely vested in him, and if not, then as the testator had made no provision for the share of any child who should *have no issue*; it was contended it should fall into the *residuum* of his personal estate: for that the only case in which any child's share was given over to the surviving children, was upon the contingency of all the issue of such child dying under twenty-one, which here had not happened, because *P.* never had issue.

Lord *Hardwicke* was clear that it never vested in *P.* himself for nothing was given to the children themselves but the share of the *yearly produce or interest* of the principal sum. But he was of opinion that it went according to the devise over; and though a distinction was taken between that and the case of *Jones v. Westcombe*, upon the ground of its being a disposition merely of personal things, and therefore not to be considered as disposed of by way of remainder, but as to take effect strictly according to the contingency upon which they are limited; yet his Lordship laid the case of *Jones v. Westcombe* was an authority directly contrary, according to Lord *Harcourt's* opinion, and that he was of Lord *Harcourt's* opinion upon the reason of the thing; that

that there could be no reason for a devise over in case of the issue of a child dying, and not in the case of a child itself dying without any issue at all.

He thought there appeared an intent that it should go over absolutely; that the introductory words of the residuary clause were, *after payment of all debts and legacies, &c. he gave the residue*; that this was a particular legacy divided from what he intended to be the *residue*; and his Lordship was of opinion, the share of *P.* ought to go among the surviving children.

So in the case of *Avelyn v. Ward*, where *A.* devised his real estate to his brother *B.* and his heirs, on condition that *B.* should give a release within three months after the testator's death; but if *B.* should neglect to give such release, he devised it to *R.*; the first devisee died in the life-time of the testator, and it was decreed that the devise over should take place; and though a distinction was contended for, between the case of a remainder over after an executory particular estate only, and those cases wherein an executory devise was introduced after a disposition of the *whole fee*, yet Lord *Hardwicke* exploded that distinction, as he did not find (he said) any authority to warrant it; and he thought the case of *Jones v. Westcombe*

1 Vezey 420.

And vide
Hayward v.
Stillington,
infra.

v. *Westcombe* above cited, a strong authority, that the construction ought to be the same, whether it be the case of a remainder limited conditionally after a particular estate, which never takes effect, or whether it be a contingent limitation after a fee: for in that case it was so in respect to the freehold, notwithstanding the devise for life which was precedent to the limitation in fee to the child; for as that fee to the child stood before the limitation over, the preceding estate for life did not alter the case as to that point.

4 Mod. 259.

It has been said indeed, that in cases of executory devises there can be no limitations over; by which, it is presumed, was meant, that where the whole interest is once given or included in any executory devise, it cannot be again limited over on another contingency; for where the whole interest was not limited in the first executory devise, it should seem, there could be no question as to the validity of a further limitation, because there still remained some interest undisposed of, and consequently something more to limit.

It is true, it formerly was held, that wherever the first executory limitation was in such words as would convey the whole interest, there any subsequent limitation was void, notwithstanding the preceding limitation never took

took effect; as where a term was limited to a man for life, and afterwards to his first and other sons in tail successively, and for default of such issue, remainder over; this remainder was held void, though no son was ever born; because the first limitation to the sons in tail was an executory devise of the whole interest: so that wherever an executory devise would, if it had vested, have carried the whole interest, no limitation over could be good, even though the preceding never vested.

Pollexf. 33.
Backhouse's
case.
Vide same
point.
1 Mod. 115.
Burgis's case.

But the doctrine in those cases has been long since denied; and it seems now to be settled, that whatever number of limitations there may be, after the first executory devise of the whole interest, any one of them which is so limited, that it must take effect (if at all) within twenty-one years after the period of a life then in being, may be good in event, if no one of the preceding executory limitations, which would carry the whole interest, happens to vest. But when once any preceding executory limitation, which carries the whole interest, happens to take place, that instant, all the subsequent limitations become void, and the whole interest is then become vested.

Thus, where a term of years was settled, upon marriage, in trust for the husband and wife for their lives and the life of the longer liver

Massenburgh
v. Ash.
1 Vern. 304.

liver of them, then in trust for the maintenance of the eldest son until his age of twenty-one years, and then to be assigned to him for the remainder of the term, and in case he should die under that age, then in trust in the like manner for the second and other sons of that marriage; in like manner one after another till one of them should attain the age of twenty-one years, and in case there should be no such issue, or all should die under twenty-one years of age, then to J. M.; husband and wife died, leaving a son who died an infant. Upon a case stated for the opinion of the Judges of C. B., they were unanimously of opinion, that the contingent limitation over to J. M. was good, because it was so circumscribed, that it must take effect (if at all) within the space of twenty-one years, (after a life then in being).

Higgins v.
Dowler.
1 P. W. 98.
Vide Sa'k.
156.

So where a term of years was settled in trust for the husband for life, then to wife for life, then to the first son of the marriage and the *heirs male of his body*, and in the same manner to all the other sons successively, and for want of sons then to daughters; husband and wife died without having had any son, but leaving a daughter, and the question was, whether she could take under this limitation, it being after a limitation in tail to the sons? Lord Chancellor Cowper held, that

if

if the limitation to the sons had taken effect, that to the daughters must have been void; but as there was no son, the latter limitation was good, for the construction must be, if a son then to him, if no son then to a daughter.

But *Salkeld* says, upon reading the settlement, it appeared to be *and in default of issue-male of the body of the husband, then to the daughters*, and so the husband took an estate-tail, and therefore the subsequent limitation to the daughters was void. However, Sir *Joseph Jekyll* afterwards in the case of *Stanley v. Leigh*, said this was a mistake. And indeed it is observable, that although an indefinite failure of issue-male of the body of the husband would have been too remote, yet, as he took an express estate for life before, and this was not the case of an inheritance, it by no means follows that he took any estate by words of implication; and the words *in default of issue-male* might well refer to such default of issue-male as was before expressed.

Vide *supra*,
p. 384. 391.

Again, where a testatrix devised a term of years in trust (after payment of debts, &c.) for *F.* for life, and after his decease for his first son and the heirs-male of his body, and in default thereof to the second and other sons of *F.* severally and respectively, in order and course

Stanley v. Leigh.
2 P. W. 618.

course as they should be in seniority of age and priority of birth, and the several heirs-male of the respective bodies of such son and sons, and in default of such issue, to the use of the daughter and daughters of *F.* and if more than one, to be divided among them share and share alike at their ages of twenty-one or marriage, and in default of daughters, or in case of their death before twenty-one or marriage, to *P.* for the then residue of the term. *F.* died without having had any issue. Sir *Joseph Jekyll*, after a very learned and elaborate argument, and a thorough examination of the several authorities on the point and investigation of their principles, held that the limitation to *P.* was good in event, as the limitation to the sons, &c. had not vested.

Vide *Stephens v. Stephens*, infra 411. decided by *Ld. Talbot* himself.

Indeed in the case of *Clare v. Clare* above cited, Lord *Talbot* seems to have held a different opinion; but, however, the uniform tenor of subsequent decisions has thoroughly established the doctrine which prevailed in these cases of *Higgins v. Dowler*, and *Stanley v. Leigh*.

Studholme v. Hodgson.
3 P. W. 300.

And so where a testator devised Exchequer-annuities, plate, and the residue of his real and personal estate to *M.* at twenty-one years of age, and in case *M.* should die before twenty-one, then to *M.*'s mother and such other child
or

or children as she should thereafter have, and for want thereof to her executors and administrators, and afterwards by a codicil declared, that in case *M.* should die before twenty-one, and his mother should die without any other children or child by *C.* her husband, then all the premisses should go to *W.* his heirs and assigns. Upon a question whether this devise over was good? The court held clearly that it was.

And in another noted case, where a devise was in these words: “ I give and devise unto my grandson *W.* after the decease of my wife, all the lands, &c. to him, *his heirs and assigns for ever*; but in case my said grandson *W.* shall happen to die before he attains the age of twenty-one years, then I give and bequeath to my grandson *T.* all the said lands, &c. to him, *his heirs and assigns for ever*, but in case my said grandson *T.* shall happen to die before he attains twenty-one years, then I give all the said lands to such other son of my daughter *M. S.* by *T. S.* as shall happen to attain his his age of twenty one years, *his heirs and assigns for ever*; the elder of such sons to take place before the younger, one after another, in order and course as they and every of them shall be in seniority of age and priority of birth, and of the several and respective

Stephens v.
Stephens.
Cal. Temp.
Talb. 228.

“ spective *heirs-male* of the several and respec-
 “ tive body and bodies of all and every such
 “ son and sons, and the heirs-male of his and
 “ their body and bodies issuing, and for de-
 “ fault of such issue, then I give and bequeath
 “ the said lands, &c. to all and every the
 “ daughter and daughters of the said *T. S.* on
 “ the body of my said daughter to be begot-
 “ ten, and to the heirs of the body and bo-
 “ dies of all and every the said daughter and
 “ daughters as tenants in common, and not
 “ as joint-tenants, and for want of such issue,
 “ then I give, devise and bequeath the said
 “ lands to Sir *R. S.* his heirs and assigns for
 “ ever.” And the testator gave all the resi-
 due of his real and personal estate to the said *T. S.*

W. and *T.* both died under age and without
 issue; *T. S.* having a son *A.* and daughter *B.*
 by his said wife *M. S.* (and having had other
 daughters who died infants) the said *T. S.*
 claimed the lands as residuary devisee under
 the said will. His wife *M. S.* claimed the
 same lands as heir at law of the testator, whilst
A. and *B.* and Sir *R. S.* claimed under the
 limitations in the will. Whereupon a case
 was stated for the opinion of the Judges of
 K. B. what estate, right or interest either
 present or in contingency any of the said par-
 ties had in the lands in question?

The

The Judges, after observing that the principal point was, whether the devise over, upon *T.*'s dying under twenty-one years, to such other sons of *M. S.* as should attain twenty-one years of age, was good by way of executory devise; said, that they found no other case but that of *Taylor v. Biddal*, where an executory devise of a freehold suspended till a son unborn should attain the age of twenty-one years, had been held good. Yet, upon the authority of that and its conformity to several late determinations in cases of terms for years, and considering that the power of alienation would not be thereby restrained longer than the law would restrain it, viz. during the infancy of the first taker, which could not reasonably be said to extend to a perpetuity, they were of opinion the said devise was good by way of executory devise.

Supra, p. 318.

That then, all the subsequent limitations would be good; for the estate would vest in *A.* at his age of twenty-one in tail-male, pursuant to the clause directing the order of succession between the sons to be born. If *A.* died under that age, it would vest in any other son of *M. S.* by *T. S.* who should attain twenty-one, in the same manner as it would have vested in *A.*; and if *A.* died under that age, and there should be no such other son who should attain

attain that age, the estate would go to *B.* and all other daughters of the said *M. S.* and *T. S.* as tenants in common in tail, with remainder in fee to Sir *R. S.*; and if *A.* should die under that age, and *B.* should then be dead without issue, and there should be no other son of *T. S.* and *M. S.* who should attain the said age, nor any other daughter of them, then the estate would go to Sir *R. S.* by virtue of the remainder to him in fee.

Barnardist.
Rep. in Chan
54.
Gower v.
Grovesnor.

And where there was a devise of an estate to *A.* for life, remainder to trustees to preserve contingent remainders, remainder to his first and other sons in tail male, remainder over to *T.* and the testator willed that his plate, jewels, library of books, furniture in his mansion-house and in his dwelling-house should go as heir looms, as far as they could by law, to the heirs-male of his family successively, as his real estate was thereby settled.

A. died without issue, the question was, whether the limitation of the said plate, &c. over to *B.* was good in event, as *A.* had never had any issue? For it was agreed, that the clause respecting the plate, &c. by referring to the settlement of the real estate, amounted to the same thing as expressly limiting the said personal chattels to *A.* for life, remainder to his first and other sons successively in tail-male,

male remainder to *T.* and thereupon it was insisted, that the limitation to *T.* was void after an express limitation in tail to the sons of *A.* Lord *Hardwicke*, without delivering a decisive opinion upon the point, declared, that in the reason of the thing there seemed to him to be a great difference between such sort of limitations *vested*, and the like limitations when *contingent*; as if a personal estate be bequeathed to *A.* for life, the remainder to *B.* and the heirs-male of his body (supposing *B.* a person *in esse*) remainder to *C.* the whole remainder in that case is vested in *B.* and *C.* can never under that limitation come in for any part of it; but if the first remainder were *contingent* in its creation, then the remainder over to *C.* would be good or bad, according to the event of the contingency; that is, if a limitation which would have been a contingent remainder in case of a real estate, should become vested during the life of any of the tenants for life, or if a posthumous child should be born who would have had the benefit of the remainder, if it had been within the statute of *W. III.* then the remainder over would be bad in event; but if no such contingency should happen then it would be good.

And vide
2 Vez 122.

So in the case of *Green v. Ekins*, where there was a bequest of personal estate to the first son of the testator's daughter who should attain

Green v.
Ekins.
3 P. W. 306.

21; and

21; and in case she should have no son who should attain that age, then to J. S. the limitation over to J. S. was held good upon that event.

3 Atk. 287.

And vide the cases of Pinbury v. Elkins, and Maddox v. Staines, and Sabbarton v. Sabbarton, before cited.

And in the case of *Sheffield v. Lord Orrery*, above cited, Lord *Hardwicke* said, it was clear and certain, that no limitation of a personal thing can be admitted after a dying without issue generally, but if this is confined to a life or lives in being, or within 10 months, or the birth of a child, or in case of the death of such child before the age of 21; or if limited on a contingency to a person who never takes, the limitation is good.

In the foregoing cases we are to observe, that wherever a preceding executory limitation carried the whole interest, a subsequent limitation was not considered as a limitation upon the preceding, and to take effect after it, but only as an alternative substituted in its room, and to take effect only in case the preceding should fail and never take effect at all; and where a preceding executory limitation did not carry the whole interest, a subsequent one was considered, either as becoming vested in interest as a remainder expectant on the preceding estate, as soon as that took effect, or else as taking effect in possession at the time limited for the preceding estate to vest, in case that

that preceding one failed of taking effect; so that in either case it follows, that if the preceding limitation was not too remote in its creation, the subsequent one could not be so, being to take effect at the time limited for the first, or else not at all.

And therefore we must be careful to distinguish between instances of this kind, and those cases wherein, either the preceding limitation is not *executory* but *vested*, or there is no preceding limitation at all; for in either of such cases the future limitation cannot be merely an *alternative*, but is absolutely limited to take effect either after the expiration of the preceding limitation, or else (if there be no preceding limitation) upon the happening of some future event. And therefore if the expiration of that preceding limitation, or if that future event be of too remote a nature, the future limitation is void in its creation, and no subsequent accident can make it good; because it is not (as in the former cases) limited to take effect or to fail upon the event of a contingency, which must be determined one way or other within the period allowed by law for the vesting of an executory devise; but is limited absolutely to take effect on an event which may not happen within such a period.

Else Thus,

Vide Caf.
Temp. Talb.
245. Sabarton
v. Sabarton.
Supra, p. 321.

Thus, altho' in the case of a devise of lands in fee to the first son of *A.* who shall attain 21 years of age, and in default of such issue remainder to *B.* in fee, such a limitation would fail, or take effect according as the first limitation should vest or not; yet if a devise be to the *heirs-male* of the body of *C.* and in default of such issue remainder to *D.* in tail, here if we suppose the first limitation void, the subsequent one is an absolute future limitation to take effect after a dying without issue; and therefore though no heirs-male of the body of *C.* should ever exist, such event will not make good the limitation to *D.* which was too remote in its creation, and could not be considered (as in the former case) merely as an *alternative* to a preceding limitation, and which must vest at the time limited for that preceding one to vest, or else not at all.

Vide 2 Bur-
row, 878.

I have before shewn that whenever a contingent limitation is preceded by a freehold capable of supporting it, it is construed a contingent remainder, and not an executory devise; but it is possible that the freehold so limited, may by subsequent accident become incapable of ever taking effect at all, (as by the death of the first devisee in the testator's life-time), in which case the subsequent limitation, if the contingency has not then happened, will be in the same condition at the testator's death
(that

(that is at the time when the will is to take effect) as if it had been limited without any preceding freehold; now in this case it has been held, that where such subsequent contingent limitation could not vest at the testator's death, it should enure as an executory devise, rather than fail for want of that preceding freehold which had never taken effect.

Thus in a case above cited, where *A.* devised lands to trustees in trust for *B.* for life, and after his decease for the first and other sons of *B.* successively in tail-male, remainder to the future sons of *C.* for life successively, with divers mean remainders, remainder over to *D.*; *B.* died without issue in the life-time of the testator, and afterwards the testator died before any of the contingent remainders were vested; the question was, Whether the mean contingent remainders were not become void, there being no preceding estate to support them? for if so, then would the whole have been vested in possession in *D.*; and it was held they should enure by way of executory devise.—And in this case a son being afterwards born to *C.* it was held that the executory devise having thereby once vested, the subsequent limitations thereupon, became contingent remainders; and though such son afterwards died before the subse-

Hopkins v.
Hopkins.
Supra, p. 231.

1 Vez. 268.
Hopkins v.
Hopkins.
1 Ark. 581.

quent limitations vested, yet were they not destroyed; because it was held, that the inheritance vested in the trustees, was as sufficient to support them, as if there had been estates limited for that particular purpose.

Supra, p. 411.

Vide supra,
p. 394, 395.

The like observation may be made in regard to the case of *Stephens v. Stephens* before cited; that until the estate became vested in some son of T. S. and M. S. who attained 21, the limitations over to the daughter and to Sir R. S. must have been executory devises; but as soon as ever the estate should become vested in a son, then those subsequent limitations must of course take effect as vested remainders upon the preceding estate-tail in such son.

Vide supra,
p. 397.
Vide 2 Vez.
249.

And so in the case of *Brownsword v. Edwards*, Lord Hardwicke held, that the limitation over would ensue by way of *executory devise* if B. died without issue under 21; and that if he died without issue after 21, when the estate had vested in him, then the limitation over would go by way of *remainder*.

Vide Carth.
310. Reeve
v. Long.
2 Saund. 380.
2 Vez. 616.

But when a preceding freehold has once vested, it seems, no subsequent accident will make a *contingent remainder* enure as an *executory devise*. This is a direct consequence of the rule above treated of, that wherever a devise

devise may be construed a contingent remainder, it shall never be considered as an executory devise.

I have had occasion to notice in the case of *Fermyn v. Arscot*, cited in a former page, that a condition or proviso to determine an estate-tail as to a particular person only, was held to be void; upon the principle, that estates in land cannot be determined *in part* only, and continue as to the residue, or vest and then cease, and again re-vest. The opinion held in that case appears to have been cited and assented to, as an authority in point, by the Judges of the Court of King's Bench, in the above cited case of *Gulliver v. Shuckburgh Ashby*.

Supra, p. 180.

and v. Plowd. 156. b.

Gulliver v. Shuckburgh Ashby, supra p. 311. and vide *4 Burrow*. 1941, & seq.

And upon the same principle, it was said by *Walmesley J.* in *Corbet's* case above cited, if a man make a feoffment in fee, upon condition that if the feoffee die his heir being under age, that his estate should cease during the minority of the heir, that such a condition is utterly void. And so in the case of a feoffment to the use of *A.* and his heirs every *Monday*, and of *B.* and his heirs every *Tuesday*, &c. that these limitations were void, for that the law knows no such fractions of estates. And that in case of a partition between coparceners, that one should have the land from *Easter* to 1st of *August*, and the other from 1st of *August* to *Easter* in *severalty*, it was good only in respect to the

Supra, p. 179.

1 Rep. 87.

*But v. 1 Inst.
4. where
Lord Coke
says they have
*several inbe-
ritances.*

the *possession* and taking the profits, but no *se-
verance* of the estate of *inheritance*; any more
than a partition to present by turns, which was
only a partition as to the possession, and they
should notwithstanding join in a writ of
right. (A)

Brook Judg-
ment, pl. 41.

1 Rep. 87.

However it appears, that a distinction has been
taken in this respect, between lands and a rent
newly created; for we find a case where rent
was granted with condition, that *when any heir
of the grantee was within age, the rent should cease
during his nonage*, and the feme of the grantee
recovered dower during the nonage, with *cesset
executio till the full age of the heir*. In this
case Lord Coke observes, that the writ of dower
was brought against the *ter-tenant*, which, he
conceived proved, that for the time, the rent
newly created should cease *per modum concess-
ionis*; and indeed the suspending the execution
till the heir should come of age, seems to prove
this.

This case of the rent, *Walmesley* observed, was
not against his opinion in respect to the land;

(A) But now by statute 7 *Anne*, c. 18. where coparce-
ners tenants in common or joint-tenants make partition
to present by turns; each shall be seised of his or her
separate part of the advowson, and to present in his or
her turn.

for

for he said, it was good as parcel of the quality of the new thing; and he put a case of a common newly created, and agreed that such quality might belong to rents and commons newly created, as being *modus donationis*. But that it was otherwise in regard to estates in land; for if they should so cease, vest and re-vest, it would be dangerous to the *præcipe* of a stranger; which inconvenience does not extend to the case of a rent or common newly created. And *Glanville* agreed with him, that a rent newly created might be made to cease in that manner, but land not.

Indeed in a case where a rent charge in fee was granted, and a fine was levied of the lands to the use, intent and purpose, that if the rent should be behind, and no sufficient distress be found upon the premises, or any rescous, &c. should be made, that then the grantee his heirs or assigns might enter, till the rent and all arrears thereof should be paid and satisfied; this was held to be no condition, but a limitation of the use; and this contingent and future use to arise upon non-payment of the rent, was held not only to be good and effectual, but also to be transferable and capable of being assigned with the rent; that it being a matter of inheritance, and for securing the payment of the rent, and waiting upon the rent, it might well be transferred with the rent; but

Ibid.

And vide
Plowd. 155 b.

Haverhill
v. Hare.
Cro. Jac. 510.
1 Roll. Abr.
Grants (N')
Pl. 3.

but that if it had been a mere possibility, or contingent estate not coupled with any other estate, it had not passed or been transferable.

Brook

Grant 86.

Plowd. 156.b.

2 Ventr. 204.

1 Lev. 144.

Salk. 577.

Moor, pl. 100.

Shower Rep.

300.

1 Ld. Raym.

52.

Shower Caf.

in Parl. 11.

Lade v.

Holford.

3 Burr. 1416.

So it seems that a rent *de novo* may be granted to commence *in futuro*, though a freehold in land may not, any more than in a rent *in esse*. And the same observation may be extended to grants, by the King, of offices not previously subsisting in fee. And something of the like nature may be noticed in regard to grants of dignities in remainder as it is called, which, it seems, operate in fact as new grants.

Here we are also to notice another late case, which seems to fall within the above mentioned rule, that estates shall not cease as to part, and vest and re-vest; and which nearly resembles the case of the feoffment put by *J. Walmesley* first above cited. It was where a testator having devised lands to trustees and their heirs, in trust for *J.* in strict settlement, with divers remainders over in strict settlement, subjoined a proviso in the will, that so often as, and during such time as the person who for the time being (in case the testator had not otherwise directed) would have been intitled in possession as tenant for life or tenant in tail, should be under the age of 26 years, then the trustees were to enter and receive all the rents and profits of the lands; out of which they were to allow certain sums for the maintenance of such tenant for life or tenant in tail, and the rest was

was to accumulate to be laid out in the purchase of lands to be settled to the same uses.

J. died upwards of 26 years of age, leaving his wife *enseint* of a son; and, upon a case sent from the Court of Chancery to the Court of King's Bench for their opinion, whether the trustees, upon the birth of the said son of J. took any and what estate in the lands, by virtue of the said proviso; they certified their opinion, that the trustees did not take any estate in the lands by virtue of the said proviso.

It has been held, that where an executory devise is limited, *per verba de presenti*, that is, where the devisee is mentioned as a person in present existence, and the commencement of the estate devised is not expressly deferred to a future period, there the devisee must be a person capable at the death of the deviser, otherwise the devise will be void; as if one devise (immediately) to the heir of J. S. and J. S. is living at the death of the testator, it is said the devise shall not be construed an executory devise, and therefore must be void; but that, if it were to the heir of J. S. *after the death of J. S.* that would be clearly good as an executory devise, because a future time is mentioned. 1 Salk. 226.

So it has been said, that a devise to the first son of A. having none at that time, is void; Ibid. 229.
but

but that if it were to the first son of *A.* when he shall have one, it would be good; though *Raym.* 83. *Bridgman* Ch. J. said, that a devise to *J. S.* for 15 years, remainder to the right heirs of *J. D.* is not good, but that a devise to one for 15 years, remainder to the first son of *J. D.* is good; because the devisor takes notice that *J. D.* hath not a son, and intends a future act.

1 Lev. 135.
Snow v. Cut-
ler.

So it was formerly disputed, whether a devise to an infant *in ventre sa mere* was good, or not; some held that it was not, upon the principle I have been mentioning, whilst others contended that it was; but all agreed, that a devise to an infant when he should be born was good.

1 Salk. 226.
Goodright v.
Cornish.

However, I have not found any case determined upon this distinction between *verba de presenti* and *verba de futuro*. For in the two cases I have cited, the judgments did not rest upon that point. In the first the limitation was to *A.* for 50 years if he should so long live, remainder to the heirs-male of the body of *A.*; the court, upon the distinction I have mentioned, seemed to incline to the opinion, that this devise to the heirs-male of the body of *A.* was not a good executory devise; but whatever it was in its creation they held it became void in event, for *A.* died without issue; so that whether it

Vide supra,
p. 407.

was

was originally void, was no direct point of their decision; the like observation may be made with respect to the other case, where a limitation was to trustees for 110 years, and then to the first son of *B.* (then unborn); it was there said upon the same principle, that this limitation should not enure as an executory devise to the first son of *B.* because limited *per verba de presenti*; but, however, since *B.* died without issue, it became void in event whatever it was in its creation, therefore I apprehend the judgment did not decide that point.

1 Salk. 229.
Scatterwood
v. Edge.

Indeed in the cases of *Moor v. Parker*, and of *Goodman v. Goodright* cited in a former page, the court seemed unwilling to admit the devises to the *issue* of the body of a man by a future wife, and to the *heirs of the body* of a woman by a future husband, to be good; or rather inclined to avoid the question whether they were so or not. But it is obvious, neither of those cases decided the point in question, as I have observed when I cited those cases; and indeed the doubt of the court respecting the validity of the limitations in those cases, could not be supported upon the distinction I am now speaking of; because a devise to the *issue* by a future wife or husband, as much implies the testator's knowledge that such issue does not yet exist, and is as strongly expressive of a future

Vide supra,
P. 324, 339.

a future time, as the case put and admitted by the court (*Salk.* 226.) of a devise to the heirs of *J. S.* after the death of *J. S.*

And the like observation may be extended to the case of a devise to an infant *in ventre sa mere*; there certainly can be no doubt that a devise to such infant, necessarily implies a future disposition to take effect at its birth, as much as if the words *when he shall be born* were added; for surely we cannot imagine an intention, that the child should take the estate before it is born.

In the infancy of executory devises, before their limits were ascertained and established, and whilst they were scarcely yet distinguished from limitations in conveyances at common law, there is no wonder that a distinction of this nature should have been taken: and that it should have prevailed to a kind of rigid absurdity, in order to guard against and prevent too great a freedom and latitude, in what was then esteemed an innovation upon the old common law; (A) but even then

(A) General restrictions in these matters, if universally adhered to with literal strictness, will necessarily involve some apparent absurdities, when applied to the circumstances of certain particular cases. But to leave it in the breast

then it seems to have been grounded upon some *supposed*, or upon the want of some *required* evidence of the testator's intention; as appears in the several cases put by the court in the places above cited, from *Salkeld* and *Raymond*.

But at this day it is clearly agreed, that a devise to an infant in *ventre sa mere* is good, though he be born after the testator's death, and he shall take by way of executory devise. *Per North Ch. J.* So in the case of *Gulliver v. Wickett* above cited, the court held, that the

1 Freem. 244.
293.

breast of the judge to relax or supersede general restrictions and rules, whenever he shall think particular cases not within the reason of them, may perhaps, by some, be thought a more important absurdity, and a matter of greater mischief in its tendency and consequences, than that which is intended to be obviated by it; for this is in fact making the DISCRETION of the judge the only law in such cases. An error, which our forefathers seem to have been even *illiberally* studious to keep clear of. For their creed seems to have been, what I have read expressed, in so much energy of terms, by a great judge even of these times. THE DISCRETION OF A JUDGE IS THE LAW OF TYRANTS; IT IS ALWAYS UNKNOWN; IT IS DIFFERENT IN DIFFERENT MEN; IT IS CASUAL AND DEPENDS UPON CONSTITUTION, TEMPER AND PASSION. IN THE BEST IT IS OFTENTIMES CAPRICE; IN THE WORST IT IS EVERY VICE, FOLLY AND PASSION TO WHICH HUMAN NATURE IS LIABLE.

Vide Lord
Caunden's ar-
gument in the
case of Doe v.
Kersey, Patch.
5 Geo. 3.
1765. C. P.

limitation

Gulliver v.
Wickett.
1 Willf. 106.
supra, p. 402.

limitation to the child of which the wife was supposed *enseint*, was a good contingent remainder (the wife taking a preceding estate for life) to a supposed child in *ventre sa mere*; and that if there had been *no devise to the wife for life*, the devise to the child for life, being in *futuro*, (by which I conceive must be meant being in its own nature future) would have been a good executory devise.

Caf. Temp.
Talbot. 145.
150.
Chapman v.
Blisset.
supra, p. 230.

And indeed in the case of a future limitation to the unborn children of the testator's grandson, Lord Talbot thought its being limited *per verba de presenti* no objection to its taking effect as an executory devise, where the intention was clearly future. So where a testator devised to his wife for 3 years, remainder to his son for 99 years, if he should so long live, remainder to him for 99 years, if such wife as he should marry should so long live, remainder to the *heirs* of his son's body, and the heirs of their bodies; the court held the devise to the *heirs* of the son's body good, as an executory devise, being to take place in *futuro*, within the compass of a life in being.

1 Willf. 225
Doe v. Carleton.

Harris v.
Barnes.
4 Bur. 2157.

Again, where a testator devised his lands to C. for the term of 90 years from his (the testator's decease) if he should so long live, and after the determination of that term, he devised the lands to the *heirs of the body of the said*

said C. remainder over. Upon a question referred to the judges of K. B. whether the heirs of the body of C. took any and what estate under the will? they certified their opinion; that the clear manifest intent of the testator was to give an estate tail to such person as should be heir of the body of C. at his death, (the only determination of the 90 years term in the testator's view) to him and to the heirs of the body of the said C. with remainder over as in the will; which intent of the testator might by law take effect as an executory devise, for the contingency must happen within the compass of a life in being; and the freehold in the mean time being undisposed of, descended to the heir at law. The reasons of this opinion seem to be clear and indisputable; and, I conceive, would go a great way towards deciding all doubts upon the above-mentioned similar point, in the case of *Moor v. Parker*, and *Goodman v. Goodright*, should they ever be moved again.

This inference at least, I think, may be fairly drawn from the last cited authorities; namely, that whatever force is to be allowed to the distinction between executory limitations *per verba de presenti* and *per verba de futuro*, it can only affect those cases, where there is not the least circumstance from which to collect

the testator's contemplation or intention of any thing else, than, an immediate devise to take effect *in presenti*.

Cro. El 878.
Pay's case,
supra 303.

1 Lutw. 798.
Clerk v.
Smith
supra 302.

2 P. W. 28.
Gore v. Gore.

It is a rule, that wherever there is an executory devise of a real estate, and the freehold is not in the mean time disposed of, the freehold and inheritance descend to the testator's heir at law. As where the testator devised lands to *A.* for five years from *Michaelmas* then next, remainder to *B.* in fee, and died before *Michaelmas*; it was held that the freehold and fee-simple descended to the heir at law till *Michaelmas*. So where *A.* seised in fee, devises to *B.* in fee, to commence six months after *A.*'s death, during those six months the estate descends and continues in the heir at law. And where a testator seised in fee devised to trustees for 500 years, remainder to the first and other sons of *B.* in tail, (and *B.* had no son born at the testator's death) remainder over in fee; it was held, that the freehold descended to the heir at law till the birth of a son to *B.* or till his death, without having had a son.

Hayward v.
Stillington.
1 Atk. 422.

So where testator gave 550*l.* to his daughters, and devised his lands for a term of 99 years in trust, that in case his wife should, within four years pay off the 550*l.* then he gave the lands to his wife for life, and after her

her death to his son *H.* and his heirs-male and female, and for want of such issue, to him and his heirs for ever, and the said term to wait on the inheritance. The wife did not pay the money, and the estate was sold under a decree upon a bill filed against *H.*; afterwards a bill was filed against the devisee of the purchaser, by the son of *H.* as heir in tail, for the reversion expectant on the term of 99 years, there having been no fine levied to the purchaser by the son, to bar the estate tail, and such purchaser having notice of the title.

Lord *Hardwicke* held, that this was a conditional limitation in the wife for life, taking place as an executory devise, (for that it could not be a contingent remainder for want of a freehold to support it) and that *H.* took an estate tail with remainder to him in fee. And though in this case the estate for life in the wife was a preceding executory limitation which never took effect, because she did not pay the money and perform the condition on which it was to arise; yet the estate-tail to *H.* was well limited, and took effect expectant on the term of 99 years; and that this being an executory devise, the freehold descended to *H.* as heir at law to the testator, till the four years were elapsed or the wife had performed the condition. And his Lordship accordingly decreed in favour of the plaintiff's title to the inheritance.

Vide *supra*,
p. 163. & seq.
and 399 & seq.

F f.

So

So where there is a preceding estate limited, with an executory devise over of the *real estate*, the intermediate profits, between the determination of the first estate and the vesting of the limitation over, will go to the heir at law, if not otherwise disposed of. As in the case of *Hopkins v. Hopkins* above cited, where the testator devised lands in trust for *B.* for life, remainder in trust for his sons successively, remainder in trust for the future sons of *C.* remainder over; and the testator provided for the disposition of the rents and profits during the minorities of those who were to take in future; *B.* died in the life-time of the testator, it was decreed the contingent limitations should enure as executory devises, and that the profits from the death of the testator till the birth of a son of *C.* should go to the heir at law; and afterwards a son being born to *C.* upon the death of that son it was decreed, that the rents and profits should belong to the heir, until some other person should become intitled under the limitations in the will.

Caf. Temp.
Tal. 44.
Hopkins v.
Hopkins.
Supra, p. 419.

1 Vezey, 268.
1 Ark. 581.
Hopkins v.
Hopkins.

Bullock v.
Stones.
2 Vez. 521.

So where a testator devised his real and personal estate to trustees, and willed that the first son of *A.* when he should attain twenty-one, should have it and his heirs male, and that he should be well educated; *A.* had no son at the testator's death. Ld. *Hardwicke* held that the intermediate rents and profits of the real estate belonged to the testator's heir at law;

law; but that the heir at law's interest would determine on the birth of *A.*'s son, because the education of that son was to be paid for by these rents and profits.

But a devise of all the *rest and residue* of the *real estate* will pass, as well the profits from the testator's death to the time of the estate's vesting, as from the determination of the first estate to the vesting of a subsequent one. As in the case of *Stephens v. Stephens* above cited, upon a devise to the testator's grandson *T.* in fee, and if he should die before the age of twenty-one, then to such other grandson then unborn as should attain the age of twenty-one, with mesne remainders, remainder over to Sir *R. S.* in fee; *T.* died under age, and it was decreed by advice of the Judges, that the intermediate profits between the death of *T.* and the vesting of the estate by virtue of any of the subsequent limitations, passed to Sir *R. S.* by force of the *residuary devise*, as an interest in the *real estate* not otherwise disposed of. So where the testator devised all the *rest and residue of his real and personal estate*, of what nature or kind soever, to such child or children as his daughter should have; it was held that the profits from the testator's death to the birth of a child of his daughter, should pass under this devise.

So likewise in the case of an executory devise of a *personal estate*, the intermediate profits,

Caf. Temp.
Talb. 228.
Stephens v.
Stephens.
supra 411.

1 Vez. 485.
Rogers v.
Gibson.
And vide
Duke of
Bridgewater.
Egerton in-
fra 436.

Chapman v.
Blisset.
Cal. Temp.
Talb. 145.
Supra 230.
Vide also
Rogers v.
Gibson. supra
last cited case.

as well before the estate is to vest, as between the determination of the first estate and the vesting of a subsequent limitation, will pass by virtue of a residuary devise. As where the testator devised his estate real and *personal* upon trust, to pay his son *B.* a certain annuity, and gave all the *rest* and *residue* of the yearly rents of the *said trust-estate* to be applied during the life of his son *B.* to the education and *benefit* of the future children of his said son, and after *B.*'s death one moiety of the *said trust-estate* to the said children, and the other moiety to somebody else; it was decreed, that the profits, from the testator's death to the birth of a child of *B.* should go entirely to *B.*'s children.

Duke of
Bridgewater v.
Egerton.
2 Vez. 122.

And where a testator gave a house with the appurtenances to his wife during her widowhood, then to his eldest son for the time being who should attain twenty-one years of age, &c. The wife married again during the minority of the eldest son. There being a *residuary* disposition as well of the real as of the personal estate, Lord *Hardwicke* held, that as to the intervening profits between the determination of the wife's interest and the eldest son's attaining twenty-one, so much of them as was *real* would fall into the *real residue*, and so much as was *personal* into the *personal residue*.

But where there is no residuary devise, or other particular disposition of them, it seems the profits of a personal estate between the death

death of a testator and the vesting of an executory estate, or between the determination of the first limitation and the vesting of a subsequent one, will accumulate for the benefit of the person next to take by virtue of the limitations.

Thus where a testator devised a share in the brewery to an infant, provided that infant should attain the age of twenty-one years, but if he should die before that age, then to *B.*: it was decreed, that the profits from the testator's death, until the infant should attain the age of twenty-one, should belong to the infant on his attaining such age. The infant died before that age, and it was decreed, that the intermediate profits belonged to *B.* and not to the infant's administrator. So where a testator devised a personal estate to *M.* an infant, and if *M.* should die before twenty-one, and his mother should have no other child, then to *W.*; *M.* died during his infancy, and it was decreed, that the rents and profits from the death of *M.* till the contingency should happen, were to accumulate and be added to the capital, and if *M.*'s mother should have no other child, they should go to *W.*

And so in the case of *Bullock v. Stones* above cited, Lord *Hardwicke* held that the personal estate passed by the will to the trustees; first indeed for the payment of debts; but that the whole surplus of it would belong to *A.*'s son upon his attaining twenty-one, and that in the meantime the profits thereof should accumulate.

But

Barnardist.
Rep. in Chan.
74 Atkinson
v. Turner.

3 P. W. 309.
Stodholme v.
Hodgson su-
pra 410.

Supra, p. 435.

Vide Bo-
raston's case.
Supra, p. 167.
Taylor v.
Biddal.
Supra, p. 318.
Mansfield v.
Dugard.
1 Eq. Abr.
195. c. 4.

Goodtitle v.
Whitby.
Supra, p. 171.
and vide
Tomkins v.
Tomkins.
cited 1 Burr.
234.

Vide supra,
p. 397.

But here we are to attend to an observation, that where an absolute property in lands is given, and a particular interest in the mean time, until the devisee comes of age, the particular interest operates only as an exception out of the devise; which is so made *subject* to it; and such limitation is not considered as a condition precedent, to make the subsequent devise contingent, upon the event of such devisee's coming of age, and so make it an executory devise; but is only taken as a description of the time when the devisee is to have possession; and the estate vests in him immediately, subject to such particular interest. Thus in the case of *Goodtitle v. Whitby* above cited, it was determined that the two nephews took immediately, and that the trustees had only a chattel interest out of the freehold in the nephew.

This observation, however, cannot apply to cases where the devisee is not a person *in esse*, or where no present interest is devised in the mean time, or where there are express and operative *conditional* words to suspend the vesting; as in the above cited case of *Bullock v. Stones*, the devisee not being *in esse*, the estate could not vest in him immediately; but must, as to him, operate *futurely* as an executory devise: and in the case of *Brownsword v. Edwards*, the words preceding and introducing the limitation to *B. viz. if he should*

should live to attain the age of twenty-one, or have issue, then to him, &c. made the devise to him expressly conditional, and to depend upon the events there mentioned; and of consequence prevented any estate from vesting in him until one of such events should happen. These two cases were limitations in tail, but had they been in fee, these same reasons would have existed against their vesting immediately.

I have in a former part of this treatise observed, that contingent estates in lands of freehold or inheritance are not deviseable, *i. e.* whilst they are contingent. But it is otherwise in regard to contingent and executory interests in terms and other personal estates. It appears indeed, that at common law a possibility has been held, not to be deviseable; though a distinction in this respect, it seems, has been taken between *interests in contingency* and *naked possibilities*. Nor was a possibility assignable, though it might be released in certain cases; but however, there are many determinations by the court of Chancery, which prove that at this day possibilities of personal estates are *deviseable*, as well as *assignable*, in equity.

Thus, where a testator possessed of a term, devised it after his wife's death to his son, and made his wife executrix, who proved the will, and consented to the legacy; afterwards the son

2 Roll. Rep.
129.
4 Rep. 65. b.
10 Rep. 50 b.
11 Mod. 127.
152.
Moor 805.
1 Vez. 411.

Veizy v. Pin-
well.
Pollex. 41.

son died in the life-time of his mother, having devised the lands comprized in the said term ; and the court held that the devisee of the son, should enjoy under his will, against the representatives of the mother.

Kimpland v.
Courtney.
2 Freem. 250.

So where a testator possessed of a term for 1000 years, devised it to *B.* for 50 years if she should so long live, and after her decease to *C.* and died ; *C.* assigned it to *D.* during the life of *B.* ; this assignment was held good.

Theoballs v.
Duffry.
9 Mod. 101.
2 P. W. 608.

So in another case, a testator devised his term to his wife for life, remainder to his son and daughter and died ; the daughter and her husband, in the life-time of the wife assigned their moiety ; and after the death of the brother, living the mother, they assigned the other moiety ; this assignment was established in Chancery, and also by the House of Lords.

Wynd v.
Jekyl.
1 P. W. 572.
And vide
2 P. W. 608.

So where a term was devised to *A.* for life, remainder to *B.* ; *B.* in the life-time of *A.* devised his remainder to *J. S.* who devised it over ; and Lord Chancellor *Parker* decreed, that the administrator *de bonis non* of *B.* should assign over the term to the devisee of *J. S.* to whom *B.* had devised it.

Higden v.
Williamson.
3 P. W. 132.

Again, where there was a devise of lands to be sold, and the money arising therefrom to be paid to such of the children of *B.* as should be living at her death ; one of her children in
her

her life-time became a bankrupt ; and it was held, that the assignment by the commissioners, passed the contingent share which he became intitled to upon his mother's decease, as he survived her.

The court, it seems, will go so far as to establish assignments of contingent interests against volunteers, even where such assignments are made, not for consideration of money, but in consideration of love and affection, and advancement of children.

Thus, where a testator devised lands to his two daughters and their heirs, but that if either of them should marry without the consent of his executors, the daughter so marrying should have only an estate for life therein ; and if either of them should die unmarried, his son *R.* or his heirs should take it to him and his heirs, paying 500*l.* to the other daughter. *R.* in the life-time of both his sisters, in consideration of *natural love and affection* to his youngest son *G.* and for his *advancement*, grants to his son *G.* the said lands, &c. and all his estate, claim, &c. After *R.*'s death, one of the daughters died unmarried, and thereupon the eldest son of *R.* brought his bill to have the estate, on payment of the 500*l.* to the other daughter, who had married with consent.

Wright v.
Wright.
1 Vezey, 409.

Lord

Vide infra,
p. 444.

Lord *Hardwicke* said, it was a claim by the heir at law against the act of his ancestor, done for what the court calls a *consideration in the second degree*, a provision or advancement for a younger child; that this was an executory devise to *R.* and his heirs; in which case if the first person dies before the contingency happens, his heir takes by descent through him: that the court admits the contingent interests of terms for years, to be disposed of for valuable consideration, though the law does not; and further permits them to be disposed of by will; and that he should not doubt, that in the case of an assignment of a contingent interest in a term for years, not for money but, for a younger child, the court would make it good. That as to the principal case being a possibility of an *inheritance*, there was no difference in the reason of the thing, between that and the allowing an *assignment* of the possibility of a *chattel real*.

Beckley v.
Newland.
2 P. W. 182.
187.

That the cases of *Beckley v. Newland* and of *Hobson v. Trevor*, were considerable; and the latter went a great way; in the former of these cases the court established an agreement between two husbands, that all legacies which should be given to either of them by the will of *T.*, whose presumptive coheirs they had married, should be divided between them, their respective executors and administrators; and in the latter an agreement by *A.* on the marriage of his daughter,

daughter, to settle one third part of all such *real estate* as should descend to him on the death of his father, was carried into execution by the court; notwithstanding the expectancy of an heir at law in the life of his ancestor, is less than a possibility; but yet it is such as he might bind by levying a fine of the lands in the life of his ancestor, which could operate by way of estoppel after the descent.

Hobson v.
Trevor.
2 P. W. 191.

That in those cases the transaction was established on the footing of an agreement for valuable consideration, to which an assignment seemed nearly allied; for that an assignment operates by way of agreement or contract; which the court considers as the engagement of the one to transfer and make good a right and interest to another.

That the consideration in the principal case was not so strong as for money; and if the question had been between the child so advanced and a *bonâ fide* creditor, the equity of the creditor would have prevailed. But such advancement was a consideration, as against any claiming *voluntarily* from the father, as executor, administrator or heir at law.—Upon these grounds Lord *Hardwicke* held, the eldest son of *R.* had no right to the redemption of the lands upon the payment of 500*l.* and dismissed the bill with costs.

By

By this case, it seems, that an assignment of a contingent interest, even in lands of inheritance for valuable consideration, may be carried into execution by the court of Chancery; upon the ground of its being such a contract or agreement, as the court may think fit to decree a specific performance of.

And that such contingent executory interests or possibilities in lands of inheritance, may be passed at law by fine by way of estoppel, appears by the authorities and cases I have cited above, when treating of contingent remainders; for it is wholly immaterial as to the operation of a fine, whether the future interest of the person levying it, in the lands of which it is levied, is a contingent remainder, or any other future or executory interest; the fine equally operates by way of estoppel to the person levying it, and those claiming under him.

Supra, p. 287.
& seq.

Vide Bro.
Pines, pl. 109.
Sir W. Jones,
495.

There still remains another property of executory devises to be taken notice of; which belongs to them in common with contingent remainders; what I mean is, that executory interest, whether in real or personal estate, is transmissible to the representative of the devisee, when such devisee dies before the contingency happens; and if not before disposed of, will vest in such representative when the contingency happens.

Vide supra,
p. 286.

Thus

Thus in the case of *Pinbury v. Elkin* above cited, where the testator, in case his wife should die without issue by him, then *after her decease*, he gave 80*l.* to his brother. After the testator's death, the brother died in the life-time of the widow, who afterwards died without leaving any issue. The court held that this possibility devolved to the executors of the brother, though he died before the contingency happened; and decreed the legacy accordingly, with interest from the widow's death.

Pinbury v. Elkin.
Supra, p. 359.
Vide 1 P. W.
566.

And so, where the testator devised land to his son *B.* but if he should die without issue-male of his body *then living*, or which might be afterward born, that then his daughter should receive at her age of twenty-one, or day of marriage, which should first happen, the sum 3500*l.* (over and above a portion before bequeathed her) but in case the contingency of his said son's dying should not happen before his daughter's said age or day of marriage, that then she should receive that sum whenever such contingency might happen, and charged the said legacy or portion on the real estate. The daughter married, having attained her age of twenty-one, and died in the life-time of her brother *B.* who afterwards died without issue-male: Lord *Talbot* decreed that the legacy should be raised, for the benefit

Caf. Temp. Talb. 117.
King v. Withers.

fit of the administrator (the husband) of the daughter: and he held, that though it did not absolutely vest, because it might never arise, yet it so far vested as to be transmissible to the representative. This decree was afterwards affirmed in the House of Lords.

3 P. W. 414.

Vin. v. 8. p.
112. ca. 38.
Gurnel v.
Wood.

Chauncey v.
Graydon.
2 Ark. 616.

So where a testator devised to *A.* and his heirs, and if *A.* should die before twenty-one, then to *B.* and his heirs: *A.* died before twenty-one, but *B.* died before him. The question was, whether *B.*'s heirs should take? It was objected, that the limitation to *B.* upon *A.*'s dying before twenty-one, was but an *executory devise*, and that such devises have always been construed as possibilities only. But the court held clearly, that although *B.* died in the life-time of *A.* yet *B.*'s heirs might well take under the *executory devise*; as such devise was to be considered equivalent in point of interest, to a contingent remainder, and consequently transmissible. And so where legacies were devised to children to be transferred to them at their respective ages of twenty-one or days of marriage; and that in case any of them should die under that age, or marry without consent, &c. his or her share should go to the others at their ages of twenty-one. Lord *Hardwicke* held, that a share accruing by the forfeiture of a child's marrying without consent, vested in another child who attained

attained twenty-one but died before such forfeiture, so as to intitle the personal representative of such deceased child, to an equal share thereof with the other surviving children; for (said he) where either real or personal estate is given upon a contingency, and that contingency does not take effect in the life-time of the devisee; yet if real *his heir*, and if personal *his executor* will be entitled to it: for though in law a possibility is not assignable, yet in equity, where it is done for a valuable consideration, it has been held to be assignable, and is transmissible to the representative of devisee.

So where *B.* in consideration of natural love and affection for her niece, and to secure to her separate use her personal estate after her own decease, granted all her personal estate to trustees in trust for herself during her natural life, and *after her decease* and payment of her debts and funeral expences, in trust for the sole and separate use of her niece alone and not for her husband, or for such person as she should appoint. The niece died in the life-time of *B.* and after *B.*'s death, her (*B.*'s) executor and residuary legatee filed his bill against the personal representative of the niece for this personal estate.

Peck v. Par-
rat. 1 Vezey,
234.

And vide
1 Vezey, 47.
2 Vez. 118.
119.

Lord

Lord *Hardwicke* said, that under a trust, a contingent interest might go to the executor or administrator, though not vested in the person during his life ; and that in the same manner the contingent interest here would go to the representative of the niece, and accordingly dismissed the bill.

Goodright v.
Searle.
2 Will. 29.

And in another late case of an executory devise of real estate, where the testator devised lands to his son *G.* his heirs and assigns for ever, but if he happened to die under the age of twenty-one years, *leaving* no issue, then he devised the lands to his (the testator's) mother *P.* in fee. After the decease of the testator, his mother died in the life time of *G.* who afterwards died under age and without issue ; and it was held, that by the virtue of the executory devise to *P.* the lands vested in her heir at law upon the happening of the contingency, *viz.* upon the decease of *G.* under age without issue ; and that this interest, whilst it was contingent and before the event happened, did not so attach in *G.* who was heir at law of *P.* upon her decease, as to carry it on his death to his heir at law, who was not heir at law to *P.* but that it vested in that person who was heir at law of *P.* (the first purchaser) at the time the contingency happened.

And

And this indeed is agreeable to that rule of descent, which requires that a person who claims a fee simple by descent from one who was *first purchaser* of the reversion or remainder expectant on a freehold estate, must make himself heir to *such purchaser*, at the time when that reversion or remainder falls into *possession*. So here the interest of *P.* was future, she had no seisin of the freehold; and therefore the person claiming by *descent* from her, must, by analogy to the above rule, be heir at law to her *when* the estate fell into possession. And as to the question started in that case, whether this executory interest did not by the descent of it from *P.* at her decease upon *G.* who was then her heir at law, become merged in the fee which he took by descent from his father (the testator), it vanishes, when we consider that the executory fee devised to the mother, could have no existence before the decease of the son under age without issue; for upon *that event only* could it arise. Now, how was it possible for it to *merge* before it had any *existence*? If it could be extinguished by merger, it must be by its union with a greater estate out of which it was to arise, and of which it might be considered as part, or at least as an extraction. But how are two estates, to unite, or one to become blended and confounded with or absorbed in the other, when both are of equal measure,

G g

viz.

V de Co. Lit.
11. b. 14. a.
15. a 3 Rep.
42.

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V de Co. Lit.
11. b. 14. a.
15. a 3 Rep.
42.

G g

viz.

viz. both fee simples; and of which the one cannot commence or partake of existence at all, but in an event which destroys and annihilates the other?

1 Eq. Abr.
400.
Dayrell v.
Champness.

Lastly, I shall observe, that in cases of contingent or executory interests, the court of Chancery will interfere in behalf of the persons intitled to such interests, to prevent unreasonable waste being committed by the tenants in possession, as appears in the case of *Dayrell v. Champness*. The court has even gone so far as to decree a restitution of the value to a contingent remainder-man, for waste committed before the contingency happened, by the tenant in possession in collusion with the person intitled to the inheritance in remainder. As where *A.* being tenant for 99 years determinable on his life, without impeachment of waste, *except voluntary*, remainder to trustees to support contingent uses, remainder to the first and other sons of *A.* successively in tail, remainder to *B.* in fee; *A.* having no son then born, agreed with *B.* to sell timber and divide the profits; a son was afterwards born, and Lord *Hardwicke* decreed that the son should recover against the representatives of *B.*

1 Vezey 524.
546.
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F I N I S.

Ex. H.L.S.

5-2-04